85-638

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

LOWENE R. CLEMENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA; UNITED STATES AIR FORCE, a military department of the United States of America, with VERNE ORR, Secretary; RONALD J. BISHOP, JR.; HAROLD L. PRAY; CHARLES L. BROWER; PHILLIP G. SENESCHAL; HARRY W. JOHNSTONE; and JEFFREY W. COOK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether federal civil service employees possess "property" interests in their positions or "liberty" interests in their careers protected by the Fifth Amendment of the Constitution, so as to allow the recovery of damages against individual federal officials who deliberately refuse to afford administrative processing in accordance with agency regulations and orders of a District Court.

2. Whether all victims of constitutional violations by governmental entities should be afforded like damage remedies irrespective of the common law doctrine of federal sovereign immunity, rather than the disparate remedies now afforded dependent upon whether the perpetrating governmental entity is a federal agency or a lesser governmental organization under Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	4
CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS	4
STATEMENT OF CASE	7
A. BACKGROUND OF PETITIONER CLEMENTE	10
B. FOUR CLAIMS OF PETITIONER CLEMENTE	13
C. INITIAL U.S. DISTRICT COURT PROCEEDINGS	15
D. INTERIM "ADMINISTRATIVE PROCESSING"	18
E. SECOND COMPLAINT AND TRIAL	23
F. SECOND APPEAL	25

		Page
REASONS FOR GRANTING WRIT		26
A.	Overview	26
B.	Certiorari Should Be Granted To Resolve Conflict Among Circuits And Determine That Federal Civil Service Positions And Careers Are Property And Liberty Interests Protected Under The Fifth Amendment	29
C.	Certiorari Should Be Granted To Insure That There Is A Damages Remedy For All Federal Constitutional Violations, Irrespective Of The Common Law Doctrine Of Sovereign Immunity	35
CONCLUSION		45
CERTIFICATE OF SERVICE BY MAIL		46

Page

APPENDIX

Appendix A:

Opinion, U.S. Court of Appeals, Ninth Circuit, dated July 24, 1985, reported at 766 F.2d 1358 1

Appendix B:

Decision, U.S. District Court, Central District of California, dated August 12, 1983, reported at 568 F.Supp. 1150 38

Judgment, U.S. District Court, Central District of California, dated August 12, 1983 138

Memorandum, U.S. Court of Appeals, Ninth Circuit, dated December 14, 1984 145

Decision and Order Remanding Case and Dismissing Without Prejudice, U.S. District Court, Central District of California, dated April 30, 1980 reported at 488 F.Supp. 854 151

Page

Judgment Remanding Proceeding for Administrative Processing and Dismissing Complaint Without Prejudice to Reopening or to Filing of New Complaint, U.S. District Court, Central District of California, dated April 30, 1980 160

Notice of Reduction in Force -- Job Offer, Department of the Air Force, dated May 12, 1977 165

Notice of Final Air Force Decision, Department of the Air Force, dated November 19, 1980 170

Appendix C:

Judgment, U.S. Court of Appeals, Ninth Circuit, dated July 24, 1985 175

Appendix D:

Paragraph 33, Air Force Regulation 40-713, dated October 20, 1975 177

TABLE OF AUTHORITIES

CASES	Page
Bell v. Hood, 327 U.S. 678 (1946)	36
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	9,28,31, 32,33,34
Bush v. Lucas, 462 U.S. 367 (1983)	33
Butz v. Economou, 438 U.S. 478 (1978)	29,41
Carlson v. Green, 446 U.S. 14 (1980)	34,35
Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980)	15
Dent v. West Virginia, 129 U.S. 114 (1889)	32
Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972)	15,16, 27,31, 32,33
Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977)	26
Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978)	26
Greene v. McElroy, 360 U.S. 474 (1959)	32
Hampton v. Fitzgerald, 409 U.S. 1100 (1973)	26

CASES	Page
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	26
Horne v. Merit Systems Protection Board, 684 F.2d 155 (D.C. Cir. 1982)	15,33
Marbury v. Madison, 1 Cranch 137 (1803)	29,36
Monell v. Department of Social Services, City of New York, 436 U.S. 658 (1978)	38,39
Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961)	43
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	14,26, 33
Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982)	33
Owen v. City of Independence, Missouri, 445 U.S. 622 (1980)	7,22,28, 35,37, 38,43, 44
Vitarelli v. Seaton, 359 U.S. 535 (1959)	32

STATUTES

28 USC sections 131	14
1254(1)	4
2101(c)	4
42 USC section 1983	5,28,41
42 USC section 2000e-16(c)	14

	Page
MISCELLANEOUS	
Fifth Amendment to the Constitution of the United States	28,31, 32,34, 41
Rules of the Supreme Court the United States, Rule 21.1(b)	1
5 CFR Part 351	12,13
5 CFR Part 713	12,13, 14
5 CFR 713.236	12
5 CFR 772.306	12
Air Force Regulation 40-351	12
Air Force Regulation 40-713	6,7,12, 13,26, 29,31
Borchard, Governmental Liability in Tort, 34 Yale Law Journal 1 (1924)	42
Byse, Proposed Reforms in Federal "Non statutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus (1962) 75 Harvard Law Review 1479	42
Carrow, Sovereign Immunity in Administrative Law - A New Diagnosis (1960) 9 J. Pub L. 1	42

MISCELLANEOUS

	Page
Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, (1970) 68 Michigan Law Review 387	42
3 Davis, Administrative Law Treatise, Ch. 27 (1958 Supp. 1965)	42
3 Davis, Administrative Law Treatise, section 27:26 at 147 and 154	44
Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Columbia Law Review 1889 (1983)	42
Reduction In Force: A Guide for the Uninitiated, 44 George Washington Law Review, 642 (1976)	11

OPINIONS BELOW [1]

The United States Court of Appeals for the Ninth Circuit has issued an opinion in this case, which has been reported at 766 F.2d 1358. A copy of this opinion appears in Appendix A to this Petition at pages 1-37.

The United States District Court for the Central District of California has issued a decision in this case, which has been reported at 568 F.Supp. 1150 (1983). A copy of this decision appears in Appendix B to this Petition at pages 38-137.

The judgment of the United States District Court for the Central District of California, from which this second appeal to the United States Court of Appeals for the Ninth Circuit was taken, was entered on

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1/ The caption of the case in this Court contains the names of all parties. Rule 21.1(b), Rules of the Supreme Court of the United States.

August 12, 1983. A copy of this judgment appears in Appendix B to this Petition at pages 138-144.

Previous to its recent opinion, the United States Court of Appeals for the Ninth Circuit, on a previous appeal by the United States in this case, issued an unreported memorandum on December 14, 1981. A copy of this memorandum appears in Appendix B to this Petition at pages 145-150.

This previous appeal of the United States was from a judgment of the United States District Court for the Central District of California, entered April 30, 1980. Copies of the Decision and Order Remanding Case and for Dismissal Without Prejudice, reported at 488 F.Supp. 854, and the unreported Judgment Remanding Proceeding For Administrative Processing, And Dismissing Complaint Without Prejudice

To Reopening Or To Filing Of New Complaint, both entered April 30, 1980, appear in Appendix B to this Petition at pages 151-159 and 160-164, respectively.

Said initial judgment and decision of the United States District Court for the Central District of California, entered April 30, 1980, were the result of a Notice of Reduction In Force -- Job Offer of the Department of the Air Force, Vandenberg Air Force Base, California, issued on May 12, 1977. A copy of this Notice appears in Appendix B to this Petition at pages 165-169.

The second judgment and decision of the United States District Court for the Central District of California, entered August 12, 1983 were the results of a Notice of Final Air Force Decision of the Department of the Air Force, Vandenberg Air Force Base, California, issued November 19,

1980. A copy of this Notice appears in Appendix B to this Petition at pages 170-174.

The judgment of the United States Court of Appeals for the Ninth Circuit to which this Petition is lodged, was entered on July 24, 1985. A copy of the Judgment appears in Appendix C to this Petition at pages 175-176.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 24, 1985. The jurisdiction of this Court is invoked under 28 USC sections 1254(1) and 2101(c).

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS

This case involves a comparison of the remedies available under the Fifth Amendment of the Constitution of the United

States and 42 USC section 1983 within the federal civil service system of the United States Air Force.

The Fifth Amendment of the Constitution of the United States provides, in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

42 USC section 1983 provides, in part:

> "Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil service processing of complaints, grievances and complaints within the United States Air Force at the time of this case was governed by Air Force Regulation 40-713, dated October 20, 1975, a portion of which regulation provided:

"If the complainant elects to proceed under FPM Chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, including the merits of the action will be reviewed under this regulation."

A copy of Paragraph 33 of Air Force Regulation 40-713, dated October 20, 1975, appears in Appendix D to this Petition at pages 177-179.

STATEMENT OF CASE

The principle espoused in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) that:

> "How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' -- be permitted to disavow liability for the injury it has begotten . . . . " Id. 445 U.S. at 651,

lies at the forefront of this case, which has resolved itself into a plea for fundamental due process in the federal civil

service system.

In 1977, Lowene R. Clemente, a career civil servant at Vandenberg Air Force Base, California, was the subject of a one-person Reduction-In-Force (herein "RIF"). Upon notification, she immediately appealed and subsequently requested a hearing on her four complaints; but still today, after eight years of complex court proceedings, two appeals, and nineteen days of trial, the United States Air Force and its officials have obstinately refused such a hearing, even though the United States District Court ordered "continuous and diligent administrative processing" of all of the "complaints of Plaintiff" and warned that the failure to accomplish administrative processing "constitute(s) arbitrary, capricious, and unreasonable denial of due process of law rights of Plaintiff."

At trial, the United States District Court was faced with the continual, obstinate refusal of the United States Air Force and its officials to accomplish administrative processing and thus fashioned a Bivens [2] damages remedy against the United States, the United States Air Force and its responsible officials. The United States Court of Appeals for the Ninth Circuit reversed the judgment against the United States and the United States Air Force finding that they were bound by precedent upholding the common law doctrine of sovereign immunity [3]. The Ninth Circuit also reversed

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2/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)

3/ The United States Court of Appeal for the Ninth Circuit noted that there was "considerable appeal to the proposition that a remedy for a constitutional violation ought not to be defeated by the common law doctrine of sovereign immunity"

the judgment against the individual officials finding that Lowene Clemente did not have a property and/or liberty interest in her federal civil service position or career subject to protection under the Fifth Amendment.

A. BACKGROUND OF PETITIONER CLEMENTE.

Petitioner, Lowene Clemente, is and was a General Schedule, civil service employee stationed at Vandenberg Air Force Base, California, with 22 years of federal service at the time of trial. She was experienced in the computer and data automation fields, was close to completing a Masters' Degree, had never been the subject of any disciplinary action, and had above-average performance reports.

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but determined that they were bound by precedent, which has not been recently reexamined.

Mrs. Clemente began her civil service career as a GS-3 Card Punch Operator and consistently rose in her position until she was promoted to a GS-07 EAM Project Planner with the 6596th Instrumentation Squadron at Vandenberg Air Force Base (herein "Vandenberg"). She remained in that position until May 17, 1977 when through a one-person RIF, she was immediately and temporarily transferred to the Base Legal Office to occupy a GS-5 position. Again, on July 17, 1977, she was reassigned to a GS-6 Computer Operator position in Base Supply. 4/ Upon notification of the RIF (Appendix B, page 165), Mrs. Clemente filed a combined RIF appeal

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4/ Although Vandenberg is an expanding installation and Mrs. Clemente has RIF priority referral and selection rights, she still remains at a GS-06 position, as she has been the target of disdain by management. Reduction In Force: A Guide for the Uninitiated, 44 George Washington Law Review 642 (1976).

and discrimination complaint with the Federal Employee Appeals Authority ("FEAA").

A RIF appeal and discrimination complaint each had, and now has, its own separate and distinct system for administrative review. 5 CFR Part 351; 5 CFR Part 713; AFR 40-351; AFR 40-713. The administrative processing of a combined or mixed case (one involving multiple claims) can be accomplished through either one of these systems -- either as a Part 351 RIF appeal with a discrimination complaint attached or a Part 713 discrimination complaint with a RIF appeal attached. 5 CFR 713.236; 5 CFR 772.306. Specifically, paragraph 33, Air Force Regulation ("AFR") 40-713 provides:

> "(2) If the complainant elects to proceed under FPM chapter 713 after having been specifically informed of his right to use the other appellate system, <u>then the</u>

entire matter, including the merits of the action, will be reviewed under this regulation." (Emphasis added; see Appendix D, page 177)

B. FOUR CLAIMS OF PETITIONER CLEMENTE.

Recognizing Mrs. Clemente's mixed appeal, the FEAA referred it to Vandenberg's Civilian Personnel Officer ("CPO") for an election in processing between Parts 351 and 713 of the Federal Personnel Manual. An election was never gained; the FEAA cancelled the processing of the claims under Part 351; and Mrs. Clemente subsequently requested processing under Air Force Regulation 40-713 and Part 713 of the Federal Personnel Manual. 5/ EEO Counsel-

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5/ Mrs. Clemente was entitled to file a complaint in a United States District Court

ing is required under 713 processing; and in the course of said informal counseling, claims of retaliation, reprisal, and violation of priority referral and selection rights surfaced. A formal complaint was subsequently lodged with the Air Force; and after waiting 180 days without notification by the Air Force (42 USC section 2000e-16(c)), Mrs. Clemente filed her initial complaint in the United States District Court asserting four claims --

1. RIF action was improper, not in good faith, for personal reasons, and was really a disciplinary measure. (Ftn. 16, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Horne v. Merit Systems Protection Board, 684 F.2d. 155 (1982); Fitzgerald v.

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through Part 713 processing. Thus, the jurisdiction of the United States District Court herein was based upon 42 U.S.C. 2000e-16(c) and 28 U.S.C. 131.

Hampton, 467 F.2d 755 (D.C. Cir. 1972).

2. RIF action was discriminatory, as petitioner asserted that her black supervisors instituted the RIF because of her caucasian race.

3. Denial of priority selection and priority referral rights.

4. Retaliation and reprisal because of the filing of the initial claims.

C. INITIAL U.S. DISTRICT COURT PROCEEDINGS.

After answering Mrs. Clemente's initial complaint, the Air Force moved to dismiss the complaint for lack of subject matter jurisdiction. On April 30, 1980, the District Court, however, determined that it had jurisdiction, Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980), and found that because of "failures by defendants,

plaintiff's complaints were never accepted or processed administratively in accordance with defendant's regulations, which processing would aid immensely in the resolution of the difficulties herein considered, which failure constituted and constitute arbitrary, capricious and unreasonable denial of due process of law rights of plaintiff." (Emphasis added, Appendix B, page 153.) Thus, "the complaints of plaintiff as presented herein (initial U.S. District Court Complaint) (were) . . . remanded to the Civilian Personnel Office . . . for continuous and diligent administrative processing . . . to be initiated within sixty (60) days . . . ." (Emphasis added, Appendix B, page 155.)

The court admonished the Air Force that "[s]aid processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative

processing entailed therein, and should be conducted so as to insure plaintiff her full rights in said processings and a fair adjudication of her complaint," with Mrs. Clemente and her attorney to be present at all stages of the administrative processing. (Appendix B, page 156.)

From this April 30, 1980 remand judgment, the Air Force appealed, again contesting the jurisdiction of the district court. On December 14, 1981, the United States Court of Appeals for the Ninth Circuit issued its Memorandum dismissing the government's appeal for "lack of jurisdiction to review the merits of the appeal" and remanded the case to the district court where "all of appellee's claims will be considered," (Emphasis added, Appendix B, page 148.)

D. INTERIM "ADMINISTRATIVE PROCESSING"

At the same time it was appealing, the Air Force began "administratively processing" Mrs. Clemente's complaints. However, the processing was done in violation of the district court's Remand Judgment and applicable Air Force regulations and considered only one of petitioner's four complaints, in spite of meetings, telephone discussions, numerous letters, and continual urgings by petitioner's attorney. The Air Force and its officials never disagreed with petitioner's attorney's position that combined administrative processing of all four complaints was required and never requested any clarification of the district court; Assistant U.S. Attorney, Peter Osinoff, even represented to the district court that administrative processing of all complaints would indeed occur.

Initially, upon the district court's remand, petitioner's attorney forwarded a copy of the Remand Judgment and requested an outline of processing steps, copies of applicable regulations, answers to interrogatories, and the production of documents, to all of which no response was ever received.

Air Force investigator Johnstone was eventually assigned to the case. Petitioner and her attorney met with defendant Johnstone and presented an outline of the complaints, proof thereon, and expectations for full administrative processing. However, defendant Johnstone advised that without the petitioner's participation, he would only investigate the discrimination complaint, that the district court had only remanded the discrimination complaint, and that he would not expand the scope of his investigation to the other three complaints, all over

petitioner's firm protest.

Petitioner's attorney then arranged for a meeting with defendant Brower, one of Vandenberg's Legal Officers and defendant Seneschal, Vandenberg's CPO, and demanded full administrative processing of all claims and the production of documents. After initially agreeing with petitioner's positions, defendant Brower later informed petitioner's attorney that neither the Air Force, the FEAA nor the Merit Systems Protection Board ("MSPB") would provide any processing. Defendant Brower's advisements were made on the same day that defendant Pray, Vandenberg's Personnel Officer, issued a "Notice of Proposed Disposition of Discrimination Complaint" proposing cancellation of petitioner's discrimination complaint upon the finding that "race was not a factor" in the RIF action.

Over the many months of the course of defendant Johnstone's investigation, petitioner's counsel wrote to defendants Brower, Johnstone, and Seneschal explaining that none of Clemente's witnesses had received interrogatories or been contacted, interrogatories for Air Force witnesses had not been sent to petitioner's counsel for review prior to sending as agreed, that requests for documents were outstanding, and that interrogatories had not been answered. These processing deficiencies were never remedied.

Upon receipt of defendant Pray's notice of proposed cancellation of petitioner's discrimination complaint, petitioner's attorney wrote to defendant Pray setting forth the numerous deficiencies in the Air Force's "administrative processing", again requesting combined adjudication of all four complaints. A

letter --- copies of which went to defendant Brower and Assistant U.S. Attorney Osinoff --- cited pertinent Air Force regulations, cautioned that constitutional due process rights of petitioner were being violated, and attached copies of Owen v. City of Independence, Missouri, 445 U.S 622 (1980), the district court's Remand Judgment, and a full memorandum of points and authorities. At the same time, another letter was sent directly to Assistant U.S. Attorney Osinoff indicating that the Air Force was violating Judge Hauk's orders, that they were refusing to diligently, promptly and completely process Mrs. Clemente's claims and that such acts were violative of the principles of Owen v. City of Independence, Missouri, supra, thereby perfecting liability of the Air Force and individual government officials to petitioner for damages.

Defendant Bishop, Vandenberg's Base Commander, several weeks later, issued a Notice of Final Decision (Appendix B, pages 170-174) indicating that the Air Force had appropriately focused its investigation, although it "acted and continues to act, under compulsion of court order" in its "good faith" attempt to comply with the district court's Remand Judgment.

E. SECOND COMPLAINT AND TRIAL

With the initial appeal still pending and the Air Force having rendered its Final Decision (Appendix B, pages 170-174), petitioner Clemente reopened the proceedings in district court on December 24, 1980, and amended her initial complaint to include due process claims against the United States, United States Air Force, and the individual defendants herein named. The due process claims were predicated upon the Air Force's post 1980 refusal to

process three of petitioner's four claims, the refusal to follow Air Force regulations and the district court's orders, and the perfunctory processing of the discrimination complaint.

In May-June, 1983, after dismissal of the initial appeal, and numerous government motions, a court trial occurred. Petitioner's claims of retaliation and denial of constitutional due process rights were upheld; the claim of racial discrimination was denied because of insufficient evidence; and other claims were left unresolved as relief therefor was subsumed in the relief awarded. Remedies granted for the Title VII retaliation included back pay, seniority promotion to a GS-12, Step 4 position with training, and attorney's fees. For the constitutional due process violations, the court awarded compensatory and punitive damages and attorney's fees.

F. SECOND APPEAL

Through a second appeal by all defendants, the Ninth Circuit Court of Appeals, on July 24, 1985, determined that they were bound by the precedent of sovereign immunity, and thus, the damages against the United States and United States Air Force were reversed; that petitioner Clemente had neither a protectable property nor a protectable liberty interest in her civil service position or career, and thus, damages against the individual defendants must fail; and that the district court applied the wrong legal standard in adjudicating retaliation damages. The judgment of the district court was thus reversed and the case remanded for further proceedings in the district court.

REASONS FOR GRANTING A WRIT

A. Overview.

Like its treatment of A. Ernest Fitzgerald, the Air Force has used a one-person "Reduction-In-Force" to rid one of its organizations of an unwanted individual. 6/ Since 1977, Lowene Clemente has demanded a name-clearing hearing. The Air Force, even after a district court order, has deliberately and obstinately refused to follow its own regulations -- particularly, paragraph 33, AFR 40-713. (Exhibit "D", page 177.) Thus, appropriate evaluations, investigations, hearings, and remedies have not occurred.

6/ Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Hampton v. Fitzgerald, 409 U.S. 1100 (1973); Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977); Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Harlow v. Fitzgerald 457 U.S. 800 (1982).

How is a district court to deal with such a recalcitrant governmental agency? By injunction, remand, reversal of the personnel action and contempt -- the Ninth Circuit Court of Appeals has stated its decision -- but not through a Bivens damages remedy. Injunction and remand were already used in this case without success. A Bivens damages remedy against responsible governmental entities and officials is necessary; otherwise due process rights of federal civil servants and the judicial power to enforce them are meaningless. There is no remedy for years of deliberate obstinance -- 8 years in this case; and federal agencies can deliberately flaunt the authority of the federal courts with impunity and without concern for the serious consequences of their actions.

1. Contrary to the District of Columbia Circuit's opinion in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), the

Ninth Circuit herein determined that there are no liberty or property interests, protectable under the Fifth Amendment, in a civil service position and career; and thus, no Bivens damages may be awarded against responsible government officials in spite of their knowing, deliberate and obstinate refusal to follow Air Force regulations and district court orders. Certiorari should be granted so that this conflict is resolved and the property and liberty interests of federal civil servants are established with district court enforcement through a Bivens damages remedy.

2. Had Mrs. Clemente been a municipal employee, she would have had a damages remedy under 42 USC section 1983. Owen v. City of Independence, Missouri, supra, 445 U.S 622 (1980). Bivens actions are analogized to those under 42 USC section 1983; Bivens and the 1983 cases are used interchangeably by this Court; and

Butz v. Economou, 438 U.S. 478 (1978) states that it is improper to draw distinctions between cases involving state and federal actions brought for constitutional violations, otherwise, the constitutional design is stood "on its head". Thus, the common law doctrine of sovereign immunity should be defeated when a federal constitutional violation exists so that a remedy is provided and the judiciary retains its authority to enforce due process and other civil liberties. Marbury v. Madison, 1 Cranch 137 (1803).

B. Certiorari Should Be Granted To Resolve Conflicts Among Circuits And Determine That Federal Civil Service Positions And Careers Are Property And Liberty Interests Protected Under The Fifth Amendment Of The Constitution

AFR 40-713 states that all the claims of an appellant are to be adjudicated in a combined proceeding with appropriate procedural safeguards. (Appendix D, page 178.) The district court, in its

Remand Decision and Judgment in April, 1980, found that the Air Force failed to properly process Mrs. Clemente's "complaints" and warned that such failure constituted an "arbitrary, capricious, and an unreasonable denial of due process of law rights of the plaintiff." Appendix B, page 153.) In remanding the case for administrative processing, the district court ordered that the "processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative processing entailed therein and should be conducted so as to insure plaintiff her full rights in said proceedings and a fair adjudication of her complaints." (Appendix B, page 156.)

Through subsequent court proceedings and continual communication by petitioner's attorney, the Air Force and each of the individual defendants, each of which

was responsible, in some part, for the administrative processing, were made personally aware of the requirements of AFR 40-713 and the district court's Remand Judgment. Yet, the Air Force and each of the individual defendants deliberately, continuously and obstinately refused to provide appropriate administrative processing or follow AFR 40-713 and the Remand Judgment, even after subsequent directives by the district court.

For these deliberate violations, the district court, relying on Fitzgerald v. Hampton, supra, determined that Clemente had a property interest in her GS-07 position and a liberty interest in her civil service career protectable under the Fifth Amendment and thereby awarded Bivens damages. The Ninth Circuit, without mentioning or distinguishing Fitzgerald v. Hampton, supra, in its opinion, determined that Mrs. Clemente did not have a protected

liberty or property interest and thus Bivens damages were inappropriate.

The right to hold specific employment and to follow a chosen career free of unreasonable governmental interference come within the liberty and property concepts of the Fifth Amendment, "property" consisting of employment itself and "liberty" being the freedom of a career. Dent v. West Virginia, 129 U.S. 114 (1889). In Fitzgerald v. Hampton, supra, the District of Columbia Court of Appeals, in relying upon dicta and differentiation in Greene v. McElroy, 360 U.S. 474 (1959) and Vitarelli v. Seaton, 359 U.S. 535 (1959) found that Fitzgerald was within the paramaters of the civil service regulations, as he was a "preferenced eligible employee"; and thus, "the statutory employment rights of Fitzgerald (were) within the liberty and property concepts of the Fifth Amendment."

467 F.2d at 762. Why else the elaborate system of adjudicating federal civil service grievances and appeals through the Federal Employee Appeals Authority , the Merit Systems Protection Board and the alternate EEO systems? Footnote 15 of Nixon v. Fitzgerald, supra, albeit dicta, is this Court's indication of agreement with the Fitzgerald v. Hampton analysis. Based thereon and Horne v. Merit Ststems Protection Board, 684 F.2d 155 (D.C. Cir. 1982), the district court herein awarded petitioner Clemente Bivens damages against the purposely deliberate and obstinate individual defendants.

The Ninth Circuit's opinion initially admits that Bivens claims may not be precluded by Title VII if they are not predicated on the same factual basis, Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982); but then concludes, to the exact contrary, that civil service remedies preclude Bivens

claims based upon different factual basis, citing Bush v. Lucas, 462 U.S. 367 (1983). Bush v. Lucas, supra, is factually distinguishable, as Bush attempted to gain Bivens and civil service remedies based upon the exact same conduct, whereas Clemente's administrative claims arise from the 1977 actions of the 6596th Instrumentation Squadron and her Bivens claims arise from the post-1980 acts of the named individual defendants -- they are not based on the same factual predicate. Thus, since there are no demonstrated special factors counselling hesitation and no adequate, alternative remedies that are equally effective, Clemente, as a victim of a constitutional violation, had a "right to recover damages". Carlson v. Green, 446 U.S. 14 (1980).

For the thousands of federal civil servants throughout our country, clarification should be provided that they

indeed possess property and liberty interests protectable under the Fifth Amendment of the Constitution of the United States; and certiorari should be granted herein.

C. Certiorari Should Be Granted To Insure That There Is A Damages Remedy For All Federal Constitutional Violations, Irrespective Of The Common Law Doctrine Of Soverign Immunity

There exists a conflict in the remedies available to a victim of a constitutional violation, dependent upon whether the perpetrator is a federal agency or lower governmental entity. Compare Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) with the remedies of Mrs. Clemente herein.

Although this Court has stated that:

> "Victims of a constitutional violation . . . have a right to recover damages. Carlson v. Green, supra, 100 S. Ct. at 1472.

"The very essence of civil liberty certainly consists of the right of every individual to claim protection of the laws, whenever he receives a injury." Marbury v. Madison, supra, 1 Cranch at 163.

" . . . where federally protected rights have been invaded, it has been the rule that courts will be alerted to adjust their remedies so as to grant the necessary relief.

And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong

done. Bell v. Hood, 327 U.S. 678, 684 (1946) and

> "A damage's remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and . . . the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen, supra, 445 U.S. at 649.

Petitioner Clemente, a victim of a constitutional violation by a federal agency, would be treated differently if the offending entity were a lower governmental entity, all because of the common law doctrine of sovereign immunity.

Mrs. Clemente's plight is no different than that of George Owen, as reported in Owen v. City of Independence, Missouri, supra. Owen, like Clemente, was advised that:

> "There is no appellate procedure or forum provided by the Charter or ordinance of the City of Independence, Missouri, relating to the dismissal of Mr. Owen."

This Court in Owen, however, noted:

> "Doctrines of tort law have changed significantly over the past century and our notions of governmental responsibility should probably reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principles of equitable loss- spreading has joined fault as a factor in

distributing the cost of official misconduct." 445 U.S. at 657.

Owen, supra, with the underpinings of Monell v. Department of Social Services, City of New York, 436 U.S. 658 (1978) held that governmental agencies, to constitutionally support the deprivation of employment rights, must be able to provide a system for the fair and proper adjudication of grievances and appeals and that governmental entities are liable in damages for violations of constitutional rights, thereby shunning the historical concepts and defenses of sovereign immunity, need for explicit sovereign immunity waivers, and restrictions upon the expenditure of public treasury funds --- concluding that proper remedies for constitutional violations and "equitable loss-spreading" are paramount interests. In summary, the court stated:

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principles in the scenario of the 1983 cause of action: the victim of a constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, as long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal responsibility for damages that are more

> appropriately chargeable to the populous as a whole. And the public will be forced to bear only the cost of injury inflicted upon the 'execution of a government's policy or custom, whether made by its law makers or those whose edicts and acts may fairly be said to represent official policy.'" 445 U.S. at

These principles are equally applicable herein and should be extended to the federal government, which has a greater capability to absorb damages. The doctrine of sovereign immunity should give way to allow recovery for constitutional violations. Otherwise, the constitutional design is indeed stood "on its head" and an illogical distinction in damages is drawn on whether the perpetrator is a federal agency or lesser governmental agency and whether the action is based upon 42 U.S.C.

section 1983 or the Fifth Amendment, contrary to Dutz v. Economu, 438 U.S. 478, 504 (1978).

The common law doctrine of sovereign immunity should give way to the supreme law of our country, the Constitution of the United States. The doctrine is mistaken, unjust and is not historically well founded, as "in Great Britain, the King himself is sued in a respectful form of a petition and he never fails to comply with the judgment of his court." Marbury v. Madison, supra, 1 Cranch at 138. See also Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, (1970) 68 Michigan Law Review 387; 3 Davis, Administrative Law Treatise, Chapter 27 (1958 Supp. 1965); Byse, Proposed Reforms in Federal "Non statutory" Judicial Review", Sovereign Immunity,

Indispensible Parties, Mandamus (1962) 75 Harvard Law Review 1479; Carrow, Sovereign Immunity in Administrative Law -- A New Diagnosis (1960) 9 J. Pub. L. 1; Borchard, Governmental Liability in Tort, 34 Yale Law Journal 1 (1924); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Columbia Law Review 1889 (1983); and Justice Traynor's decision in Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961).

Owen, supra, changed the law in 44 states and the District of Columbia. Justice Powell's dissent, Owen v. City of Independence, Missouri, supra; and there is no reason why a federal agency, who perpetrates a constitutional violation, should be entitled to an automatic exemption for damages. In summary,

> "Nothing in the Bivens opinion limits the doctrine to a case in which federal employees are

> defendants. The theory of the opinion is broad enough to produce the same result if . . . the defendant is the United States or a local government . . . . The Supreme Court should . . . make clear that any violator of the Constitution is liable for damages in a suit directly under the Constitution." 3 Davis, Administrative Law Treatise, section 27:26 at 147 and 154.

Otherwise,

> "How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' --

be permitted to disavow liability for the injury it has begotten."

Owen, supra, 445 U.S. at 651.

Certiorari should be granted so that all victims of constitutional violations are afforded appropriate remedies.

CONCLUSION

Wherefore, petitioner Lowene R. Clemente prays that a writ of certiorari be granted so that the liberty and property interests of federal civil servants are clarified and that all victims of constitutional violations are afforded appropriate remedies.

Dated: October 7, 1985

Respectfully submitted,

HATCH AND PARENT

S. TIMOTHY BUYNAK, JR.

By_____
S. TIMOTHY BUYNAK, JR.

CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Lowene R. Clemente, petitioner herein, hereby certify that on October 11, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition For Writ Of Certiorari on each of the parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addresed as follows:

Solicitor General
Department of Justice,
Washington, D.C. 20530

Edward R. Cohen
United States Department of Justice
Room 3127
9th and Penn N.W.
Washington, D.C. 20530

All parties required to be served have been served.

Dated: October 11, 1985

S. TIMOTHY BUYNAK, JR.

S. Timothy Buynak, Jr.

STB57

85-638

Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

LOWENE R. CLEMENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA; UNITED STATES AIR FORCE, a military department of the United States of America, with VERNE ORR, Secretary; RONALD J. BISHOP, JR.; HAROLD L. PRAY; CHARLES L. BROWER; PHILLIP G. SENESCHAL; HARRY W. JOHNSTONE; and JEFFREY W. COOK,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

S. TIMOTHY BUYNAK, JR.
HATCH AND PARENT
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INDEX TO APPENDIX

	Page
Appendix A:	
Opinion, U.S. Court of Appeals, Ninth Circuit, dated July 24, 1985, reported at 766 F.2d 1358	1
Appendix B:	
Decision, U.S. District Court, Central District of California, dated August 12, 1983, reported at 568 F.Supp. 1150	38
Judgment, U.S. District Court, Central District of California, dated August 12, 1983	138
Memorandum, U.S. Court of Appeals, Ninth Circuit, dated December 14, 1984	145
Decision and Order Remanding Case and Dismissing Without Prejudice, U.S. District Court, Central District of California, dated April 30, 1980 reported at 488 F.Supp. 854	151

Page

Judgment Remanding Proceeding for Administrative Processing and Dismissing Complaint Without Prejudice to Reopening or to Filing of New Complaint, U.S. District Court, Central District of California, dated April 30, 1980 160

Notice of Reduction in Force -- Job Offer, Department of the Air Force, dated May 12, 1977 165

Notice of Final Air Force Decision, Department of the Air Force, dated November 19, 1980 170

Appendix C:

Judgment, U.S. Court of Appeals, Ninth Circuit, dated July 24, 1985 175

Appendix D:

Paragraph 33, Air Force Regulation 40-713, dated October 20, 1975 177

APPENDIX A

FOR PUBLICATION
Filed July 24, 1985
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOWENE R. CLEMENTE, Plaintiff/Appellee -vs- UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, a military department of the United States of America, with VERNE ORR, Secretary, of the United States Air Force, RONALD J. BISHOP, JR., HAROLD L. PRAY, CHARLES L. BROWER, PHILLIP G. SENESCHAL, HARRY W. JOHNSTONE, and JEFFREY W. COOK, Defendants/Appellants.	)	CA No. 83-6187 DC No. 80-5746 O P I N I O N
LOWENE R. CLEMENTE, Plaintiff/Appellee, -vs- UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, a military department of the United States of America, with VERNE ORR,	)	CA No. 83-6188 DC No. 79-3952

Secretary of the United States Air Force, RONALD J. BISHOP, JR., HAROLD L. PRAY; CHARLES L. BROWER; PHILLIP G. SENESCHAL; HARRY W. JOHNSTONE; and JEFFREY W. COOK,	)	
Defendants/Appellants.	)	
LOWENE R. CLEMENTE,	)	
Plaintiff/Appellee	)	CA No. 83-6430 DC No. 80-5746
-vs-	)	
UNITED STATES DEPARTMENT OF THE AIR FORCE AND VERNE ORR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE AIR FORCE,	)	
Defendants/Appellants.	)	

Appeal from the United States
District Court
for the Central District of California
Andrew A. Hauk, District Judge, Presiding
Argued and Submitted December 14, 1984 -
San Francisco, California

BEFORE: CHOY, CANBY AND NORRIS, CIRCUIT JUDGES.

CANBY, CIRCUIT JUDGE:

Plaintiff, a white civilian Air Force employee, brought an employment discrimination action after an Air Force "reduction

in force" (RIF) resulted in her reassignment. She also asserted due process violations arising out of the alleged failure of Air Force officials fully to process her discrimination claims.

Defendants challenge the district court's rulings that plaintiff: (1) had demonstrated retaliatory discrimination entitling her to back pay and "seniority relief;" and (2) had established a violation of her administrative due process rights entitling her to "Bivens-type" compensatory and punitive damages against the United States, the U.S. Air Force, the Secretary of the Air Force, and named Air Force officers and employees. Defendant Secretary of the Air Force also challenges an order of the district court holding the Secretary in contempt. We reverse the judgment for damages and vacate the contempt order.

BACKGROUND [1]

Plaintiff Lowene Clemente, a civilian Air Force employee, originally filed an action in district court alleging (1) reverse racial discrimination; (2) coercive and retaliatory measures taken against her for filing administrative claims; (3) denial of reemployment priority rights; and (4) improper implementation of a reduction in force. The complaint was an out growth of an EEO proceeding which began in 1977, when Clemente appealed her RIF reassignment, on race discrimination and other grounds, to the Federal Employee Appeals Authority (FEAA).

The FEAA notified the Air Force that under applicable Civil Service regulations, two alternative methods were available to process Clemente's appeal: that set forth in 5 C.F.R. Part 351 or that in 5 C.F.R. Part 713. [2] A further regulation then in effect provided that

> If the appellant has not been informed of the separate rights of appeal, the Appeals Authority shall refer the matter to the agency so the agency may explain the alternative rights of appeal to the appellant as provided in § 713.236 of Part 713 of this chapter and afford him the opportunity, if appropriate, to elect the avenue of appeal he wishes to pursue.

5 C.F.R. section 772.306(a)(1977). The FEAA requested the Air Force to secure plaintiff's election in writing. Clemente was contacted by a representative of her employing facility, Vandenberg Air Force Base, and informed of the two options. On advice of counsel, she failed to respond.

Meanwhile, the FEAA sent two letters to Vandenberg in an effort to ascertain the appellate option Clemente had elected. Upon

notification by Vandenberg that no response had been received to its letter requesting an election, the FEAA notified Clemente's counsel that her "Part 351" appeal had been cancelled.

Shortly thereafter, Clemente secured new counsel. Her new attorney promptly wrote the FEAA and Vandenberg, informing each that Clemente assumed that her Part 713 appeal was still being processed. The FEAA's response noted that the Part 351 appeal had been cancelled, and the Part 713 appeal was to be handled by officials at Vandenberg.

Under Air Force regulations,

> If the complainant elects to proceed under FPM Chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, <u>including the merits of the action</u>,

will be reviewed under this regulation.

AFR 40-713, section 33 (emphasis added). Pursuant to this regulation, an EEO counselor was assigned to interview Clemente and explore her RIF and discrimination claims. After the interview, Clemente was notified of her right to file a formal discrimination complaint, and she did so. This formal complaint was rejected by the Air Force as untimely. Her initial complaint in district court followed.

In April 1980, the district court issued a decision. Finding a failure by the Air Force properly to process Clemente's complaints, the court remanded the "complaints of plaintiff as presented herein" to Vandenberg AFB "for continuous and diligent administrative processing by the Defendants under applicable Air Force regulations." 568 F. Supp. at 1156. The court admonished that "[s]aid processing

should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative processing entailed therein, and should be conducted so as to insure Plaintiff her full rights in said proceedings and a fair adjudication of her complaints." Id.

Following the district court's remand and this court's unpublished opinion dismissing defendants' appeal for lack of finality, Clemente v. United States, No. 80-5508 (9th Cir. Dec. 14, 1981), defendant Johnstone was appointed by the Air Force to investigate Clemente's claims. In an initial meeting, Clemente and her counsel presented Johnstone with an outline of Clemente's complaints and administrative processing expectations. Johnstone responded that he could only process the discrimination claim. An exchange of correspondence followed in which Clemente's counsel emphasized his disagreement with

the limitations placed on the scope of the investigation and the processing steps undertaken, insisting that such limitations were violative of the court's April remand order. By letter, Johnstone informed Clemente's counsel that the court had only remanded the discrimination claim, that it was not his responsibility to define the issues accepted for investigation, and that he had received nothing from the Air Force indicating that he should broaden the scope of his investigation.

Shortly thereafter, Clemente's counsel arranged a meeting with defendant Brower, Vandenberg's Legal Officer for Labor Relations, and defendant Seneschal, Vandenberg's Civilian Personnel Officer. The parties discussed the appropriate processing of Clemente's RIF appeal, her priority reemployment rights claim, and the reprisal charges. Clemente's counsel made a request that the Air Force produce certain

documents. Soon afterward, Seneschal sent Clemente's counsel a letter indicating, inter alia, that Clemente's document requests would be honored.

Several weeks later, defendant Brower informed Clemente's counsel that Air Force headquarters had determined that no further processing could be provided either through the Air Force or the FEAA's successor organization, the Merit Systems Protection Board (MSPB) [3].

That same day, Clemente's counsel wrote Johnstone complaining that none of Clemente's witnesses had received interrogatories or been contacted, interrogatories had not been sent to Clemente's counsel for review as previously agreed, and the request for documents was still outstanding. Johnstone never answered this letter, and the processing deficiencies referred to remained unremedied. One week later, Johnstone forwarded a report to

Vandenberg's base commander finding no discrimination. Thereafter, Brower reconfirmed to Clemente's counsel that there would be no further processing of her claims.

One month later, defendant Pray, Chief of Personnel at Vandenberg, issued a "Notice of Proposed Disposition of Discrimination Complaint" recommending cancellation of Clemente's complaint. Upon receipt of this notice, Clemente's counsel wrote Pray alleging deficiencies in the Air Force's processing of her claims, and requesting combined adjudication of all four issues. His letter -- copies of which went to Brower and defendants' attorney -- cited Air Force regulations, the purported constitutional rights of plaintiff, and the court's remand judgment. A similar letter was sent directly to defendants' attorney, again detailing alleged deficiencies in the Air Force's processing of plaintiff's claims, and stressing that this failure

"diligently, promptly, and completely [to] process Mrs. Clemente's claims thereby "perfect[ed] causes of action for constitutional violations against the Air Force as well as any governmental official responsible for these actions." 568 F. Supp at 1158.

Several weeks later, defendant Bishop, base commander at Vandenberg, issued a "Notice of Final Decision" cancelling Clemente's complaint, but asserting that the Air Force had made a "good faith attempt" to comply with the court's April remand judgment.

Clemente thereupon reopened proceedings in the district court and amended her initial complaint to include a due process claim against the United States and individual defendants. The due process claim was predicated upon the Air Force's refusal to follow its own procedures, its refusal to process three of Clemente's four

administrative claims, and its perfunctory processing of the discrimination complaint.

Following a bench trial, the district court found that while plaintiff had not suffered racial discrimination, the evidence was sufficient to establish retaliation in violation of Title VII. The court awarded back pay and accorded seniority relief (with training, if necessary). In ruling on the constitutional claim, the court found that both the United States and the individual defendants had violated Clemente's due process rights, and awarded compensatory and punitive damages accordingly. The district court also awarded plaintiff attorneys' fees on both of her successful claims. Subsequently, the district court held the Secretary of the Air Force in contempt of the order granting relief to plaintiff on the merits. These consolidated appeals of the district court's orders followed.

DISCUSSION

I. Plaintiff's Constitutional Claim

A. United States as Defendant

In addition to finding liability by individual defendants, the district court awarded "Bivens-type" compensatory and punitive damages against the United States and the United States Air Force absent an express waiver -- and despite the spirited assertion -- of sovereign immunity. 568 F. Supp. at 1171. We reverse.

The district court viewed its order awarding damages directly against the United States as "the natural and logical extension" of Supreme Court precedent recognizing and extending liability for so-called constitutional torts. 568 F. Supp. at 1167. Relying upon both Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and subsequent cases concerning

the scope of 42 U.S.C. 1983, [4] the district court held that

> [n]ot overlooking the fact that the Owens [sic] decision addressed the issue of a municipality being held liable in a §1983 action, the issue of a federal sovereign violating its own Constitution is indistinguishable. Accordingly, this Court finds that the federal government is not immune from an action brought against it as a result of its agents having violated the Fifth Amendment rights of a United States citizen.... We cannot help but recognize and enforce the natural and logical extension of Butz and Owens [sic], which leads us inescapably to conclude that just as state agencies and state officers are both liable for constitutional violations under 42 U.S.C. §1983, so also federal agencies and federal officers should be and are

liable for constitutional violations under Bivens.

568 F. Supp. at 1167 (emphasis in original).

We cannot accept the district court's proposition that Bivens and Owen logically compel the United States to be held liable in damages for the constitutional trots of its officers. [5] "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 103 S.Ct. 2961, 2965 (1983). Admittedly, there is considerable appeal to the proposition that a remedy for a constitutional violation ought not to be defeated by the common law doctrine of sovereign immunity. [6] We consider the issue foreclosed against plaintiff, however, by a long line of Supreme Court cases, see, e.g., Hill v. United States, 50 U.S. (9 How.) 409, 413 (1850);

United States v. Lee, 106 U.S. 196, 207 (1882); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 318, 388 (1939); Mitchell, supra. The proposition is also contrary to the implication of our own decision in Holloman v. Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1983), where we held a Bivens remedy unavailable against federal officials being sued, not in their individual capacity for their individual actions, but simply because of the offices they hold. See also Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1984). It follows that the district court's award of compensatory and punitive damages against the United States and the United States Air Force must be reversed.

B. Individual Officials as Defendants

In awarding Bivens damages against individual defendants, the district court held that the failure of defendants fully to process Clemente's discrimination claims

violated her right to due process as secured by the fifth amendment. Defendants contend that even if plaintiff's Bivens claims are not precluded by Title VII, [7] they must fail because (1) civil service administrative remedies provide the relief for an alleged deprivation of protected civil service statutes, and (2) plaintiff has not otherwise demonstrated a deprivation of liberty or property sufficient to implicate the due process clause. We agree with both of the defendants' contentions.

To the extent that the district court based its due process Bivens ruling on plaintiff's property interest in her "GS-7 position," 568 F.Supp. at 1168, it is contrary to the Supreme Court's decision in Bush v. Lucas, 103 S.Ct. 2404, 2417 (1983). There, the Court held that the comprehensive system established by Congress to remedy violations of constitutional rights in connection with federal employment and

personnel policy was exclusive; it could not be augmented by non-statutory "Bivens-type" relief. Bush v. Lucas accordingly precludes Bivens relief based directly on injury to plaintiff's interest in her GS-7 position.

The district court purported, however, to find an independent property interest arising from the court's order to process plaintiff's complaint fully. See, e.g., 568 F. Supp. at 1164, 1168 and 1169. A mere command to follow certain procedures, however, does not create an underlying property interest, even when the command is derived from the Constitution. Such an interest must be "created by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The

district court's order creates no such property interest. While violation of the order might constitute contempt, it does not give rise to a Bivens constitutional tort claim.

The district court also grounded its finding of a deprivation of due process in the Air Force's failure to follow its own regulations:

> The Air Force established procedures for evaluating combined RIF appeals and discrimination complaints as well as complaints of reprisal and reemployment priority rights. See AFR 40-713.... Having once established these procedures, they must be followed or plaintiff's due process rights will be violated.... The Air Force, however, repeatedly failed to abide by these procedures....

568 F. Supp. at 1168.

Notwithstanding this finding that the Air Force failed fully to follow its own regulations, such procedural requirements, without more, do not create constitutionally cognizable property interests. To hold otherwise would immediately incorporate virtually every regulation into the Constitution. [8]

This court has repeatedly held that

> [p]rocedural requirements ordinarily do not transform a unilateral expectation into a constitutionally protected property interest. A constitutionally protected interest has been created only if the procedural requirements are intended to be a 'significant substantive restriction' on ... decision making. If the procedures required pose no significant limitation on the discretion of the decision maker, the expectation of a specific decision is not enhanced enough to

establish a constitutionally protected interest in the procedures. Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984) (citations omitted); see also Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1315 (9th Cir. 1984); Parks v. Watson, 716 F.2d 646, 657 (9th Cir. 1983); Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980); Hayward v. Henderson, 623 F.2d 596, 597 (9th Cir. 1980); Russell v. Landrieu, 621 F.2d 1037, 1040 (9th Cir. 1980).

Here, AFR 40-713 expressly provided for review of "the entire matter, including the merits of the action," once a complainant elects to proceed under Part 713. The outcome of that review, however, is left to the discretion of the base commander. [9] Although the commander's decision is appealable to the Civil Service Commission or the courts, A.F.R. 40-713, ¶28 & 29, the regulation provides no significant

restrictions on the commander's decision-making, Goodisman, 724 F.2d at 820, nor does it provide articulable standards to guide his discretion. Parks, 716 F.2d at 657. As a result, plaintiff cannot successfully claim a constitutionally cognizable property interest arising from the Air Force's regulation.

None of the foregoing should be read as abrogating the well-settled rule that regulations validly prescribed by an agency are binding upon it. [10] See, e.g., Accardi v. Shaughnessy, 347 U.S. 260. 267 (1954); United States v. Newell, 578 F.2d 827, 834 (9th Cir. 1978); Mendez v. INS, 563 F.2d 956, 959 (9th Cir. 1977); Mabey v. Reagan, 537 F.2d 1036, 1042 (9th Cir. 1976); Note, "Violations by Agencies of their Own Regulations," 87 Harv.L.Rev. 629 (1974). Our holding is simply that plaintiff has failed to demonstrate the existence of a constitutionally protected "property" interest,

deprivation of which would entitle her to damages. See Hayward v. Henderson, 623 F.2d 596, 598 (9th Cir.1980)

Much of what we have just said applies as well to plaintiff's alleged liberty interest. Clemente does not possess a "liberty interest [in] her Civil Service career. 568 F. Supp. at 1168. The mere fact of dismissal does not cause a deprivation of liberty. Loehr, 743 F.2d at 1310, 1317 (citinq Roth, 408 U.S. at 575; Bishop v. Wood, 426 U.S. 341, 348 (1976)). Instead, "'[t]o implicate constitutional liberty interests, . . . the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities.'" Id. (citinq Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982)). No such stigmatization has been shown here. The

district court's decision awarding Bivens relief against the individual defendants must accordingly be reversed.

II. Title VII

Appellants contend that the district court applied the wrong legal standard in holding that plaintiff had been a victim of retaliation forbidden by Title VII. We agree.

This court has held that "[o]nce the plaintiff has established a prima facie case, the burden of production devolves upon the defendant to articulate some legitimate, non-retaliatory reason for the adverse action. The defendant need not prove the absence of retaliatory intent or motive; it simply must produce evidence sufficient to dispel the inference of retaliation raised by the plaintiff. If the defendant meets this burden, the plaintiff must then show that the asserted reason was a pretext for retaliation. The ultimate

burden of persuading the court that the defendant unlawfully retaliated against her remains at all times with the plaintiff." Cohen v. Fred Mayer, Inc., 686 F.2d 793, 796-97 (9th Cir. 1982)(citations omitted).

We find no indication in the district court's findings or opinion that it afforded the defendants the full benefit of this process. The Air Force offered non-retaliatory explanations for its actions but the district court, except for rejecting the Air Force's jurisdictional points, did not address them. Because they were not addressed, there was no consideration of the question whether they were pretextual. The full trial process envisaged by Cohen was consequently short-circuited, and plaintiff was essentially awarded a judgment on the strength of her prima facie case[11] that the defendants had an inadequate opportunity to rebut.

Because the district court neither applied the appropriate legal standards nor "articulate[d] the standards by which it evaluated the evidence and arrived at its finding of liability," id. at 797, its finding of retaliation is reversed and the issue remanded for reconsideration in light of the applicable precedent. Id. at 798. [12]

III. Attorneys' Fees

The district court awarded attorneys' fees and costs against the United States in connection with Clemente's constitutional claims. 568 F. Supp. at 1171. The predicate for an award of fees under 28 U.S.C. ¶2412 (EAJA), however, is that the party seeking the award "prevailed." Since the district court incorrectly found Bivens liability against the United States absent an express waiver of sovereign immunity, we vacate this award of fees and costs. [13]

Under 42 U.S.C. ¶2000e-5(k), attorneys' fees are available to the prevailing party in a Title VII action. Since we have remanded on the issue of retaliation, we also vacate the award of attorneys' fees under Title VII pending reconsideration of the retaliatory discrimination issue by the district court.

IV. Contempt

The district court entered its judgment in this action on August 12, 1983. See 568 F. Supp. at 1150. On October 3, it found defendants Secretary of the Air Force and Department of the Air Force guilty of civil and criminal contempt for deliberately and contemptuously disobeying its order of August 12. The district court assessed cumulative fines of over $2,000 per day from the entry of judgment in August through October 3. Appellants contend that the court abused its discretion in this regard. We agree.

"'Where ... a judgment of contempt contains an admixture of criminal and civil elements, 'the criminal aspect of the order fixes its character for purposes of procedure on review.'" Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983). To sustain a judgment of criminal contempt, willful disobedience must be proved beyond a reasonable doubt. Id. at 782. "Willfulness" means, in this context, a deliberate or intended violation of the court's order. Id.

As the government notes, the sequence of events here alone is sufficient to establish that defendants were not in willful disobedience of the district court's August 12 order. Ten days after the order was entered, defendants filed their notice of appeal, and, on August 23, immediately upon expiration of the automatic stay provided by F. R. Civ. P. 62(a), defendants moved in the district court for

a stay of the judgment. While that motion was still before it, the district court issued, on September 23, an order to show cause why defendants should not be held in contempt. Finally, on October 3, the district court simultaneously held defendants in contempt and denied their motion for a stay pending appeal.

As appellants suggest, to find a defendant guilty of "willful and deliberate defiance of the court's order," United States v. United Mine Workers, 330 U.S. 258, 303 (1947), when a stay has been immediately sought would render meaningless the whole process by which parties invoke the power of the courts to defer the effect of their judgments. The Supreme Court has recognized that "willfulness" may be qualified "by a concurrent attempt on defendants' part to challenge the order by motion to vacate or other appropriate procedures." United Mine Workers, 330 U.S.

at 303. Appellant's motion to stay was an "appropriate procedure." Accordingly, we vacate the judgment of contempt.

CONCLUSION

The judgment of the district court in favor of plaintiff is in all respects reversed. The rulings of the district court holding the Secretary and the Department of the Air Force in contempt are vacated. The case is remanded to the district court for further proceedings relating to plaintiff's claim for retaliation in violation of Title VII, and any other matters consistent with this opinion. [14]

FOOTNOTES

1. The facts in this case are more fully set forth in the opinion of the district court. See Clemente v. United States, 568 F. Supp. 1150, 1152-59 (C.D. Cal. 1983).

2. Part 351, captioned "Reduction in Force," specifies the procedures "[e]ach agency shall follow ... when it releases a competing employee from his competitive level by separation, demotion, furlough ..., or reassignment...." 5 C.F.R. section 351.201(a)(1977).

Part 713 "sets forth the reguations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel actions ... and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination...." 5 C.F.R. section 713.201(a) (1977)

3. The Air Force claimed that plaintiff's appeal was an FEAA appeal, and there was no saving clause allowing the MSPB to assume appeals before the now-disbanded FEAA. Thus, argued the Air Force, only the discrimination complaint could be processed administratively.

4. In Bivens, the Supreme Court implied a damage remedy against federal officers for the violation of plaintiff's fourth amendment rights. 403 U.S. 390-97. The Bivens doctrine has been progressively expanded to embrace other constitutional violations. See Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980); see

generally K. Davis, Administrative Law Treatise, §27:2 (1984). In Butz v. Economou, 438 U.S. 478 (1978), the Court declined to "accord[] to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under §1983." Id. at 500. In Owen v. City of Independence, Missouri, 445 U.S. 622 (1980), the Court extended liability for constitutional violations under §1983 to municipalities.

5. First, the rationale for abrogating municipal immunity in Owen is simply inapposite. As the Court was careful to make clear, "[s]ince colonial times,... local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations...." Owen, 445 U.S. at 638-39. The same is not true of the federal sovereign. See note ___ infra; Borchard, "Government Liability in Tort," 34 Yale L. J. 1 (1924). Second, the governmental immunity at stake in Butz and Bivens differs from that at issue here. The district court's order permits recovery for damages from the United States; while Bivens and Butz permit recovery against governmental officials sued in their individual capacities; neither case contemplates damages against the government itself. See Owen, 445 U.S. at 638 n.18. Indeed, as the Court acknowledged in Butz, "Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could ... obtain an award of monetary damages against the responsible federal official" precisely because "[t]he barrier of sovereign immunity is frequently

impenetrable." 438 U.S. at 504 (emphasis added).

6. At least one commentator has urged the Supreme Court to extend Bivens to constitutional violations by the government. See K. Davis, Administrative Law Treatise, § 27:26, at 147 & 154 ("Nothing in the Bivens opinion limits the doctrine to a case in which federal employees are the defendants. The theory of the opinion is broad enough to produce the same result if ... the defendant is the United States or a local government.... The Supreme Court should ... make clear that any violator of the Constitution is liable for damages in a suit directly under the Constitution.") (emphasis omitted). See also Borchard, "Government Liability in Tort," 34 Yale L.J. 1 (1924)(classic attack on the doctrine of federal sovereign immunity); W. Blackstone, 3 Commentaries 23, 109, quoted in Bush v. Lucas, 103 S. Ct. 2404, 2408 n.10 (1983)("every right, when withheld, must have a remedy, and every injury its proper redress.").

7. To the extent that plaintiff's Bivens claims are founded in actions proscribed by Title VII, they may not be maintained because Title VII provides the exclusive remedy. Brown v. GSA, 425 U.S. 820 (1976); White v. GSA, 652 F.2d 913, 917 (9th Cir. 1981); see Nolan v. Cleveland, 686 F.2d 806, 815 (9th Cir. 1982).

8. "It goes without saying that it would be neither sound law nor desirable policy to constitutionalize every state ... regulation." Wakinekona v. Olim, 664 F.2d 708, 712 n. 4 (9th Cir. 1981), rev'd on other grounds, Olim v. Wakinekona, 461 U.S. 238 (1983). See also Shango v. Jurich,

681 F.2d 1091, 1101 (7th Cir. 1982) ("Constitutionalizing every state procedural right would stand any due process analysis on its head. Instead of identifying the substantive interest at stake and then ascertaining what process is due to the individual before he can be deprived of that interest, the process is viewed as a substantive end in itself. The purpose of a procedural safeguard, however, is the protection of a substantive interest to which the individual has a legitimate claim of entitlement.").

9. See A.F.R. 40-713,¶¶12(f), 24(c)(6), 25(b) (Oct. 20, 1975)(superseded by A.F.R. 40-713 (June 15, 1982)).

10. As Justice Frankfurter observed, "[a]n executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword." Vitarelli v. Seaton, 359 U.S. 535, 546-47 (1959)(Frankfurter, J., concurring in part and dissenting in part). To "perish" by the procedural sword, however, is not to pay Bivens damages. The appropriate remedy for the refusal of an agency to follow its own regulations may be injunctive relief, reversal of the agency action, or reversal and remand with an order requiring the agency to follow its procedures. Indeed, the district court's initial remand required appellants diligently to process all of plaintiff's

claims. 568 F.Supp. at 1156. Willful failure to do so would arguably support a finding of contempt; it does not, however, permit Bivens damages.

11. We note as well that the district court erred in its articulation of the requisites of a prima facie case of retaliation. The district court stated that a prima facie case is established by showing knowledge by the employer that a complaint has been filed, followed by adverse employment action. 568 F. Supp. at 1160. The standard established by Cohen, however, requires the showing of a causal link between the protected activity and the adverse action, by "evidence sufficient to raise the inference that [plaintiff's] protected activity was the likely reason for the adverse action." Cohen, 686 F.2d at 796.

12. Our remand makes it unnecessary to reach appellants' contention that the district court erred in excluding testimony essential to an accurate calculation of back pay and seniority rights. We note, however, that the central objective of Title VII is to "make whole" victims of prohibited discrimination. See Franks v. Bowman Transportation Co., 424 U.S. 747, 774 (1976). Toward that end, a court may certainly weigh expert testimony suggesting what plaintiff would have earned on the basis of hypothetical promotion schedules. When an expert, however, is asked to assume that plaintiff would occupy a particular position but for improper retaliatory actions, any correspondence between the expert's calculations and the actual salary loss suffered by plaintiff obviously will depend upon the accuracy of this assumption, an assumption which defendants are

entitled to attempt to refute. Finally, we note that damages under plaintiffs Title VII claim must be confined to those caused by unlawful retaliation, if retaliation is proved upon remand. The district court found against plaintiff on her cause of race discrimination.

13. Our disposition of the sovereign immunity issue makes it unnecessary to reach appellants' additional contention that an award of fees and costs would be unwarranted under the EAJA in any event. We note, however, that the district court expressly relied upon "the decision of Lauritzen v. Secretary of the Navy, 546 F. Supp. 1221 (C.D. Cal. 1982), for the proposition than an award of attorneys fees in a Bivens action may be analogized to a similar award in a §1983 action which is authorized by 42 U.S.C. §1988." 568 F.Supp. at 1171. This court recently reversed that decision on precisely this point. Lauritzen v. Lehman, 736 F.2d 550, 554-55 (9th Cir. 1984).

14. In her amended complaint, plaintiff asserted a claim that the RIF to which she was subject was conducted in violation of pertinent statutes and regulations. The district court made no rulings regarding that claim, probably because relief therefor would have been subsumed in the relief it ordered on the Title VII and constitutional claims. We also do not reach the merits of that claim, which may be addressed by the district court on remand. We express no opinion as to whether that claim is in fact independent of any of plaintiff's other claims. Cf. Nolan v. Cleland, 686 F.2d 806, 815 (9th Cir. 1982)(constitutional due process claim subsumed by Title VII claim when factual predicate is same).

APPENDIX B

FILED August 12, 1983
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOWENE R. CLEMENTE, Plaintiff, UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, a military department of the United States of America, with HANS M. MARK, Secretary, RONALD J. BISHOP, JR., HAROLD L. PRAY, CHARLES L. BROWER, PHILLIP G. SENESCHAL, HARRY W. JOHNSTONE, and JEFFREY W. COOK, individually and as officers and/or employees of the United States Air Force, Defendants.	No. CV-80-5746 AAH DECISION (For Plaintiff and Against Defendants)

APPEARANCES:

HATCH & PARENT, by S. Timothy Buynak, Jr., and Thomas D. Wise, Santa Barbara, California, for plaintiff.

STEPHEN S. TROTT, United States Attorney, FREDERICK M. BROSIO, JR., Assistant United States Attorney, Chief, Civil Division, by and through PETER R. OSINOFF and KATHRYN W. TATE, Assistant United States Attorneys, Los Angeles, California, for defendants.

This matter came on for nonjury trial on May 23, 1983, and continued thereafter for 19 days until June 21, 1983, whereupon argument was heard. Thereafter, the Court took the matter under consideration and submission.

Plaintiff is a White Caucasion citizen of the United States who, at all times herein mentioned, was and now is employed

as a General Schedule (hereafter "GS") civil service employee at Vandenberg Air Force Base, California. Her positions have been primarily in the computer and data automation fields. By this action plaintiff seeks two types of relief:

First, equitable relief flowing from alleged employment discrimination based on race in connection with a reduction in force (hereafter "RIF") that was effective on July 17, 1977. It is also alleged that reprisal discrimination occurred as a result of the filing of a "RIF" appeal. These claims are brought under 42 U.S.C. section 2000e-16 (Title VII of the Civil Rights Act of 1964, as amended) and 28 U.S.C. section 1331.

Secondly, and in addition to the above claims, plaintiff contends that she is entitled to damages for the alleged violation of her constitutional right to due process arising out of the defendants'

failure to fully process her claims after Judgment of this Court remanding to the Air Force all proceedings on April 30, 1980. The jurisdictional support for this claim is also 28 U.S.C. section 1331.

The factual basis of this action is extremely complex and may be effectively analyzed only by focusing on three relevant time periods.

I

FACTS PRIOR TO THE JULY 1[illegible], 1977 RIF

Plaintiff has been a Civil Servant of the Federal Government since 1958 and has been assigned to Vandenberg Air Force Base, California since 1965. In 1968, plaintiff was promoted to a GS-7, Computer Operator position in Base Supply. In 1971, this position was downgraded to a GS-6, Step 9, as a result of a base-wide classification downgrade for all computer operators. On December 8, 1974, plaintiff was promoted to the position of Electronic Accounting

Machine (hereafter "EAM") Project Planner, GS-362-07, with the 6596th Instrumentation Squadron, Operations Support Branch. Her grade level was that of a GS-7, Step 8. Following this promotion, plaintiff performed well in the opinion of her superiors until the beginning of 1976.

In 1976, plaintiff's immediate supervisors were changed and replaced by Black individuals. Thereafter, plaintiff alleges, these individuals conspired and attempted to undermine plaintiff and have her removed from her position. It is contended that this removal from office was effectuated through a RIF, following a period of tension between plaintiff and her new superiors. The RIF was requested on April 13, 1977 by Master Sergeant Bruce Daniels, a Black. In anticipation of this action, plaintiff filed a telegram appeal with the Civil Service Commission on April 8, 1977. This appeal was dismissed on June

7, 1977, as being premature. Thereafter, plaintiff retained Leonard A. Newton, Esq., an attorney in Santa Maria, California, to assist in the processing of her complaint. Newton advised plaintiff not to communicate with Air Force personnel and indicated that he would assume responsibility for the processing of her complaint. Plaintiff testified that after retaining Newton and receiving his advice, she "left the matter fully in his hands."

The above-mentioned RIF was actuated on May 12, 1977, and upon plaintiff's acceptance of the only alternative position offered, she was transferred into a temporary position at the Base Legal OFfice. She remained at this position until July 17, 1977, the effective date of the RIF, at which time she was placed in her present position as a Computer Operator, GS-6, Step 10. On this same day Newton sent a telegram to the Federal Employee Appeals

Authority (hereafter "FEAA"), appealing the RIF action, stating that the RIF was the consequence of "inverse racial discrimination and personality dislikes on the part of [plaintiff's] superiors." In addition to this telegram, Newton sent a letter to the FEAA charging that the plaintiff's downgrade was the "result of an artifically created reduction in force."

II

FACTS SUBSEQUENT TO THE RIF

On July 18, 1977, the FEAA corresponded with Civilian Personnel Officer William Coady of Vandenberg Air Force Base indicating that two alternative methods of appeal were available to process plaintiff's complaint, these methods being set forth in Part 713 and Part 351 of the Civil Service Commission's Regulations. The FEAA requested the Civilian Personnel Office to secure plaintiff's election to process under one of these regulations "in

writing," and requested it to inform plaintiff of certain rights she had and the method of processing under each regulation. Plaintiff's written election of the method of processing was to be secured within ten days of receipt of the July 18, 1977 letter to the Civilian Personnel Office. On July 26, 1977, Civilian Personnel Officer Coady forwarded the July 18, 1977 letter of the FEAA to plaintiff, requesting her to make an election as to the procedure under which she intended to proceed and admonishing her that "further action on the appeal is delayed until your choice of procedures is provided to us in writing." At trial, plaintiff testified that she received Mr. Coady's letter with the FEAA letter attached. She noted that Newton had received a copy of the FEAA letter. Thereafter plaintiff communicated with Newton who advised her not to respond to either of these letters and that a

resolution of the matter was forthcoming. Plaintiff was not contacted again that year by the Civilian Personnel Office despite her continuing daily work presence at Vandenberg Air Force Base.

Plaintiff was in contact with her attorney, Newton, for the last time in December, 1977, when he assured her that he had filed a complaint and a hearing had been set in the distant future. During the period between July 26, 1977 and February 7, 1978, two requests were made by the FEAA for a response from the Base to its letter of July 18, 1977. ON February 7, 1978, Mr. Coady responded to the FEAA stating that no response had been received from the plaintiff to its request that she make an election of procedures. Mr. Coady did not make any further attempt to contact plaintiff or her attorney during this period. On February 21, 1978, the FEAA sent a letter to Newton notifying him that the

plaintiff's "Part 351" appeal (5 C.F.R., Part 351) had been cancelled. The plaintiff also received this letter.

Plaintiff testified at trial that, because of the repeated assurances of Newton, she interpreted the February 21, 1978 letter from the FEAA to mean that her "Part 713" appeal (5 C.F.R, Part 713) was still progressing. However, subsequent to receiving this letter, she became suspicious that her attorney was not handling the case in a proper manner and attempted to contact him. Following numerous attempts to reach Newton by telephone and by mail and receiving no response, plaintiff engaged the services of her present attorney, Timothy S. Buynak, Esq of Santa Barbara. Thereafter, Buynak did a thorough search of state and federal court records to determine the status of plaintiff's "case," as presumably filed by her first attorney, Newton. Having no success in

locating any action filed on behalf of plaintiff, Buynak endeavored to contact Newton by telephone and numerous letters. It was eventually discovered that Newton was the subject of disbarment proceedings before the California State Bar. Newton's attorney in those proceedings was requested to advise Newton to contact Buynak concerning plaintiff's case. On October 2, 1978, portions of plaintiff's file were sent to her new attorney, Buynak, from Newton, together with the information that the only filing that he had made was with the FEAA.

On October 25, 1978, Buynak wrote to both the Civilian Personnel Office at Vandenberg and the FEAA, informing each that plaintiff assumed her claim was being processed under Part 713. On October 27, 1978, the FEAA responded to this letter stating that the Part 351 appeal had been cancelled and that the Part 713 appeal was to be handled by the employing agency,

namely, the U.S. Air Force at Vandenberg Air Force Base. On November 6, 1978, Mr. Coady, the Civilian Personnel Officer at Vandenberg, replied to attorney Buynak's October 25, 1978 letter advising him that no action had been taken on the Part 713 appeal. Four days later Buynak responded to Mr. Coady requesting that the agency begin Part 713 processing because plaintiff was "ready, willing and able to cooperate" with the agency in processing her complaint. Civilian Personnel Officer Van Nice responded, directing that plaintiff should contact Chief EEO Counselor Carol McCool. After this was accomplished by Buynak, Ms. McCool assigned Joanne Tomlinson as counselor in the matter. An initial interview with plaintiff was held by Ms. Tomlinson on February 2, 1979, at which time plaintiff's claims of improper and discriminatory RIF were considered, as well as her secondary complaints of reprisal,

and denial of re-employment priority status with respect to job vacancies at Vandenberg Air Force Base. Ms. Tomlinson expressed to plaintiff her belief that the original complaints would not be considered timely and thereby affirmed that she would concentrate on the issue of plaintiff's priority rights. Ultimately, Ms. Tomlinson did recommend placement through plaintiff's priority rights so as to resolve her complaints.

Subsequent to her final interview with Ms. Tomlinson, plaintiff received a "NOTICE OF FINAL INTERVIEW WITH AN EEO COUNSELOR" dated February 23, 1979, which informed her that if she believed she had been discriminated against on the basis of race, color, religion, sex, national origin or age, a discrimination complaint could be filed within 15 days of receipt of the notice. Plaintiff thereafter filed a formal discrimination complaint, also on February 23,

1979. The Air Force, on March 21, 1979, rejected plaintiff's complaints as being untimely. The Notice of Final Agency Determination, however, was not sent by certified mail as required by Air Force Regulation (hereafter "AFR") 40-713, Paragraph 23e, October 20, 1975. At trial, plaintiff testified that she never received this notice and thus has validly invoked the jurisdiction of this Court by filing her district court complaint 180 days after the date of lodging a formal administrative complaint with the Air Force.

On October 11, 1979, plaintiff filed her initial complaint in district court, asserting three causes of action and alleging four claims. The claims consisted of (1) reverse racial discrimination; (2) coercive and retaliatory activity for having filed administrative claims; (3) denial of reemployment priority status; and (4) improper RIF. After answering on

February 25, 1980, defendants moved to dismiss the action pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1) on the basis that the Court lacked subject matter jurisdiction. This motion was heard on April 21, 1980. Following this hearing, the Court, on April 30, 1980, made and entered its Decision, with Findings of Fact and Conclusions of Law, Order and Judgment, remanding all of plaintiff's claims to the defendants for complete administrative processing. That Decision states in pertinent part:

DECISION Remanding Proceedings to Air Force (4/30/80)

* * *

Findings of Fact

The Court, having considered the pleadings herein, the Certified Administrative Record, the Memoranda and Declarations submitted by both

sides, and having heard oral argument of counsel, finds that:

1. Plaintiff's failure to discuss her case with an EEO Counselor is not a jurisdictional defect;

2. Defendants through their personnel at Vandenberg Air Force Base, California, had an affirmative duty to timely refer Plaintiff's complaints to an EEO Counselor for consideration and to fully advise Plaintiff of the administrative processing requirement and her rights therein, which Defendants failed to accomplish, although Plaintiff has been consistently employed at Vandenberg Air Force Base, California, since lodging her complaints;

3. Because of these failures by Defendants, Plaintiff's complaints were never accepted and processed administratively in accordance with Defendants' regulations, which processing would aid

immensely in the resolution of the difficulties herein considered, which failure constituted and constitute arbitrary, capricious and unreasonable denial of the due process of law rights of Plaintiff.

4. Jurisdiction of this Court to hear discrimination complaints under 42 United States Code section 2000e-16 terminates thirty days after receipt of the final notice of agency determination by the Plaintiff; otherwise, this Court has continuing jurisdiction to entertain the judicial complaint herein, beginning 180 days after Plaintiff filed her formal initial charge with the agency;

5. Notice of the final agency determination was never received by Plaintiff. Defendant Air Force, in violation of its own regulations (A.F.R. 40-713, October 20, 1975, Para. 23e.), failed to send to Plaintiff and her representative a written decision by certified mail, return receipt

requested. And because 180 days have elapsed between the filing of Plaintiff's formal initial charge and the filing of the complaint herein, this court has continuing jurisdiction.

* * *

Conclusions of Law

1. This Court has subject matter jurisdiction over this action.

2. Defendants' motion to dismiss for lack of subject matter jurisdiction should be denied.

3. In the interest of justice and fairness to all parties, the complaints of Plaintiff as presented herein should be remanded to the Civilian Personnel Office of Vandenberg Air Force Base, California, for continuous and diligent administrative processing by the Defendants under applicable Air Force regulations to final determination by the Defendant Air Force and the other said Defendants, all of said

processing to be initiated within sixty (60) days of the date of entry of the within Decision and Order.

4. Said processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative processing entailed therein, and should be conducted so as to insure Plaintiff her full rights in said proceedings and a fair adjudication of her complaints.

5. In addition to said rights and privileges afforded by said regulations, Plaintiff should be entitled to be present at all stages of the administrative processing and to be represented thereat by her legal representative.

6. Plaintiff should not be questioned at any time without her legal representative being present and Plaintiff's legal representative should receive

copies of all written communications involved in this administrative processing.

7. If the Defendants fail to initiate the said administrative processing within sixty (60) days from the date of entry of the within Decision and Order, or to fully, properly and diligently process said complaints of Plaintiff through all stages to final determination by the Air Force, this Court, upon motion by Plaintiff, should consider reopening of this proceeding herein and granting the relief prayed by the Plaintiff in her complaint on file herein.

8. This proceeding and the complaint herein should be dismissed without prejudice to:

(a) the reopening of this proceeding upon motion of Plaintiff if the Defendants fail to initiate said administrative processing within sixty (60) days from the date of entry of this Decision and

Order, or fail to fully, properly, and diligently carry on said processing to final administrative determination in strict compliance with the regulations of Defendant Air Force; or

(b) the filing by Plaintiff of a new complaint for review of the said administrative processing and final determination if Plaintiff is dissatisfied or has good legal cause to complain and seek judicial review of any portion of said administrative proceeding or final determination.

* * *

Let Judgment Be Entered Accordingly.

* * *

JUDGMENT of Remand (4/30/80)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' Motion to Dismiss for lack of subject matter jurisdiction is denied.

2. The case and proceeding herein is remanded to Defendant Air Force, and the other Defendants, and particularly to the Civilian Personnel Office of Vandenberg Air Force Base, California, for continuous and diligent administrative processing by Defendants under applicable Air Force regulations to final determination by the Defendant Air Force and the other said Defendants, such processing to be initiated within sixty (60) days of the entry of the aforesaid Decision and Order and the within Judgment.

3. The Court reserves its jurisdiction and right to reopen the within proceeding, upon motion of Plaintiff, if Defendants fail to initiate the said administrative processing within said sixty (60) day period, or fail to fully, properly and diligently process Plaintiff's

complaints through all stages to final determination by the Defendant Air Force, in strict compliance with its regulations.

4. This proceeding and the complaint herein are hereby dismissed, but without prejudice to:

(a) the reopening of this proceeding upon motion of Plaintiff if the Defendants fail to initiate said administrative processing within sixty (60) days from the date of entry of this Judgment, or fail to fully, properly and diligently carry on said processing to final administrative determination in strict compliance with the regulations of Defendant Air Force; or

(b) the filing by Plaintiff of a new complaint for review of said administrative processing and final determination if Plaintiff is dissatisfied or has good legal cause to complain and seek judicial

review of any portion of said administrative processing or final determination.

* * *

III

FACTS SUBSEQUENT TO THE APRIL 30, 1980 REMAND JUDGMENT

On June 27, 1980, the Defendants, United States of America and the United States Air Force, through Hans M. Mark, Secretary, appealed the order of this Court remanding proceedings for administrative processing and dismissing the complaint without prejudice to reopening and to filing a new complaint. The Ninth Circuit Court of Appeals heard oral argument on this appeal on November 6, 1981 and issued its Unpublished Opinion dismissing the appeal for lack of finality on December 14, 1981. Clemente v. U.S.A., et al, No. 80-5508, Slip Op. (9th Cir. 1981). The events occurring after the Remand Judgment of the District Court on April 30, 1980,

and after the 9th Circuit Opinion dismissing the appeal therefrom on December 14, 1981, constitute the main bases for plaintiff's constitutional claims of procedural due process denials.

During the interim between the District Court hearing on the Motion to Dismiss on April 21, 1980, and the Remand Judgment on April 30, 1980, plaintiff's attorney Buynak wrote to Civilian Personnel Officer Phillip Seneschal of Vandenberg Air Force Base encouraging the Base to promptly initiate the administrative process in plaintiff's case, requesting full and complete processing of all claims, a proposed schedule for processing, an outline of all processing steps, and copies of all applicable regulations, documents requested by motions to produce and answers to interrogatories. On May 2, 1980, Assistant U.S. Attorney Peter Osinoff, attorney for the defendants, admonished Buynak that all

communications should be sent directly to him. In response to this admonition, Buynak on May 6, 1980, wrote to Osinoff demanding that administrative processing commence immediately and warning that any further delay would evidence a "wilful intent to extend these proceedings and arbitrarily deny the due process rights of [plaintiff]," citing Owen v. City of Independence Missouri, 445 U.S. 622 (1980)

On May 23, 1980, EEO Counselor Hattie Hall requested the services of an Air Force Investigator, which request began the administrative processing of plaintiff's discrimination claim. Upon receiving notification of that request, Buynak wrote to Osinoff urging that he advise Vandenberg Air Force Base to comply with this Court's April 30, 1980 Judgment. On June 27, 1980, Osinoff authorized Buynak to correspond directly with the Air Force, stating that the United States Attorney's Office "has no

involvement in administrative proceedings of the Air Force . . . . " Osinoff also enclosed a Notice Of Appeal to the Ninth Circuit Court of Appeals and insisted that this Court's April 30, 1980 Judgment was stayed by the same.

Subsequent to the above, plaintiff and Buynak met with Air Force Investigator Harry W. Johnstone, and presented him with an outline of plaintiff's complaints, her administrative processing expectations and a declaration with a substantial number of exhibits attached. At that time Mr. Johnstone stated that he could only process the discrimination claim of plaintiff and none of the other claims. On July 22, 1980, Buynak emphasized his disagreement with the limitations placed on the scope of the investigation and the processing steps undertaken, relying on his belief that such limitations were violative of this Court's Remand Judgment. On July 25, 1980, Mr.

Johnstone replied to this correspondence stating that this Court had remanded the discrimination claim only, and further insisting that it was not his responsibility to define the issues which had been accepted for investigation and that he had received no guidance from the Air Force indicating that he should broaden the scope of his investigation. Attached to this letter was a schedule outlining accomplished or anticipated processing steps, along with the actual and estimated dates of completion of each step.

Buynak also addressed a letter to Major Charles S. Brower, Legal Officer for Labor Relations at Vandenberg, outlining the difficulties encountered in processing, and requesting a meeting on July 30, 1980. Buynak concluded by charging that the agency either did not know what it was doing or was wilfully violating the orders of this Court. The meeting took place, as

scheduled, on July 30, 1980, with Major Brower, Mr. Seneschal and Buynak in attendance. Various alternatives were discussed concerning the processing of plaintiff's RIF appeal, her priority re-employment rights claim and the reprisal charges. On August 8, 1980, Mr. Seneschal memorialized the substance of the June 30, 1980 meeting in a letter directed to Buynak, acknowledging the request for documents and assuring the latter that this request would be complied with. On September 16, 1980, Major Brower related to Buynak that Air Force Headquarters had reached the determination that no further administrative processing could be afforded, either directly through the Air Force or indirectly through the FEAA or the Merit Systems Protection Board (hereafter "MSPB"). This decision was assertedly based on the claim by the Air Force that plaintiff's appeal was an FEAA appeal and that there was no

savings clause allowing the MSPB to assume appeals before the FEAA. The FEAA had been disbanded and would be unable to consider the claims. Thus, concluded the Air Force, plaintiff's claims, apart from her discrimination claim could not be administratively processed. On September 16, 1980, Buynak again wrote to Investigator Johnstone, requesting a report on the status of the investigation and bringing to the latter's attention that none of the plaintiff's witnesses had been contacted or interrogatories set to them. interrogatories had not been sent to be reviewed by Buynak as previously agreed, and the request for documents was still outstanding. This correspondence was never answered. On September 22, 1980, Mr. Johnstone forwarded his Report Of Investigation to the Base Commander at Vandenberg, finding no discrimination. Thereafter, Major Brower reconfirmed to Buynak that

there would be no further processing of the plaintiff's claims.

On October 17, 1980, Lieutenant Colonel Pray, Chief of Personnel at Vandenberg, issued a "Notice of Proposed Disposition of Discrimination Complaint - Lowene R. Clemente," recommending cancellation of plaintiff's complaint. Upon receipt of this notice, Buynak, on October 31, 1980, wrote to Lt. Col. Pray alleging failures in the processing of plaintiff's claims as required by this Court's Judgment of Remand, and requesting combined adjudication of all four claims. This request made specific reference to the Air Force's own regulations; the constitutional rights of plaintiff; this Court's Remand Judgment; and the decision of Owen v. City of Independence, supra, which was attached to the letter along with the Motion of plaintiff before the Court of Appeals "To Dismiss the Appeal or Affirm, And for Equitable and

Constitutional Relief." This letter was also sent to Major Brower and to Osinoff, defendants' attorney. On October 31, 1980, Buynak again wrote Osinoff stressing that defendants failed to "diligently, promptly and completely process Ms. Clemente's claims," thereby "perfecting causes of action for constitutional violations against the Air Force as well as any governmental official responsible for these actions," again citing Owen v. City of Independence, supra.

Finally, on November 19, 1980, a "Notice of Final Decision" was rendered by Colonel Ronald J. Bishop, Jr., Base Commander of Vandenberg Air Force Base. This decision cancelled the plaintiff's complaint and added, self-servingly, that the Air Force had made a "good faith attempt" to comply with the Remand Judgment of this Court.

After receiving the final Air Force decision, plaintiff filed motions before this Court to reopen proceedings and for leave to file an amended and supplemental complaint. It was at this time that plaintiff's attorney added the causes of action for constitutional violations in addition to the Title VII claims. These motions were granted and, in addition, this Court ordered that defendants maintain the status quo with respect to plaintiff's employment and provide her with RIF priority rights. Thereafter, on August 16, 1982, cross-motions for summary judgment were heard by the Court. Plaintiff asserted the deprivation of constitutional rights of administrative due process, equitable estoppel, right to equitable relief, and improper RIF. Defendants contended that, under Rules 12(c) and 56 of Federal Rules of Civil Procedure, plaintiff's claims were time barred and that the Court lacked

jurisdiction over matters not encompassed by the administrative complaint. In addition, defendants argued that the plaintiff had not charged a proper defendant with the Title VII violations, to wit, Hans M. Mark, the Secretary of the Air Force. All cross-motions were dened and the first three causes of action of the complaint were amended so that the Secretary of the Air Force would be the only defendant named and charged in these Title VII causes of action.

The last pre-trial motion was heard on April 4, 1980, at which time this Court determined that the defendants named in the last three causes of action were entitled to neither absolute nor qualified immunity from suit. The triable issues having been established, this matter proceeded to nonjury trial before the Court on May 23, 1983.

IV

DISCUSSION

Turning to the legal issues raised by the pleadings in this case, plaintiff's claims under Title VII and the Constitution will be considered separately, as well as all defenses to each such claim, setting forth the fact findings and legal conclusions which compel and support a Judgment for plaintiff and against defendants as hereinafter ordered.

1. Plaintiff's Title VII Claim, 42 U.S.C. section 2000 e, et seq.

Plaintiff's Title VII claims flow from alleged inverse racial discrimination which ultimately resulted in the RIF and in retaliatory action against plaintiff in connection with her filing of a discrimination complaint. At trial, the Court found the evidence insufficient to support plaintiff's claim of racial discrimination as such. A finding of discrimination,

however, is not a necessary condition precedent to recover under Title VII if there is a showing of retaliation by the defendant against the plaintiff for having filed a discrimination complaint. See Shelei and Grossman, Employment Discrimination Law, 426-33 (BNA 1976). The basis for an action challenging the alleged retaliatory activity of an employer is found in 42 U.S.C. section 2000e-3(a) which provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The issue of retaliation is raised in the amended complaint which alleges the following retaliatory acts to have been committed by and through the agents of defendants Hans M. Mark, Secretary of the Air Force:

(a) erosion and change of position, responsibilities and duties;

(b) removal of plaintiff into an office by herself and separation from her employment section;

(c) removal of plaintiff into an interim position at the grade of GS-5 even before the effective date of the RIF action;

(d) undermining plaintiff's supervisorial authority and controls;

(e) refusal to inform plaintiff of matters regarding the performance of responsibilities and duties;

(f) refusal to consider plaintiff's allegations in good faith, fair resolution, and

(g) refusal to provide supervisory direction for plaintiff.

The filing of a discrimination complaint is a protected right. As provided in the Air Force's own Regulations, 5 CFR section 713.261 (1977):

> Complainants . . . shall be free from restraint, interference, discrimination or reprisal at any stage of the presentation and processing of a complaint, including the counseling stage under Section 713 or any time thereafter.

The evidence necessary to show retaliation is (1) knowledge by the employer that the complainant has or will file a charge; and (2) different conditions of employment, before and after the filing of a complaint, with negative conditions first appearing at or after the filing of a complaint. See Pettyway v. American Cast Iron Company, 411 F.2d 998 (5th Cir. 1969); Barlea v. United

Nuclear Corporation 462 F.2s 149 (10th Cir.) 1972). The burden of proof on the employee is only a showing by a fair preponderance of credible evidence. EEOC v. Kallir, Philips, Ross, Inc. 411 F. Supp. 66 (SDNY 1975), aff'd 559 F.2d 1203 (2d Cir. 1977).

At trial there was credible evidence to support a finding of retaliation on the part of the Air Force. This evidence, inter alia, consisted of the government's destruction of relevant documents prior to this matter proceeding to trial and the cover-up of the same. [1] Moreover, this was accompanied by the callous disregard of plaintiff's right to have her grievances aired before the appropriate administrative body by failing to advise her, as urged by the FEAA, of her need to elect between complex procedural remedial schemes, and the ultimate cancellation of her administrative complaint and failure to provide

further processing with respect to all but one of plaintiff's claims because of her alleged failure to make the required election and see an EEO counselor within the time prescribed by regulation. In addition, it was demonstrated at trial that plaintiff was removed from office into an interim GS-5 position even before the effective date of the RIF, and had also been segregated from her fellow employees in an isolated office at an even earlier point in time. The transparent purpose of these retaliatory actions was to punish plaintiff as a troublemaker, a purpose which, in the opinion of this Court, stemmed in part from plaintiff's clear and prompt indications of her intent to file a discrimination complaint against her Air Force employer. These indications commenced as early as late 1976, when the plaintiff initiated contact with an individual she believed to be an EEO counselor,

and continued through April 8, 1977, when she filed her "telegram appeal" with the Civil Service Commission. This notice, when coupled with the subsequent actions of the defendant Air Force, is sufficient to establish a prima facie case of retaliation under 42 U.S.C. section 2000e-3(a).

Defendant Air Force contends that the Court is without jurisdiction to dispose of plaintiff's claims under Title VII due to her failure to comply with the 30 day "statute of limitations" established by 42 U.S.C. section 2000e-16(c). See, Brown v. General Services Administration, 425 U.S. 820 (1976). In Mahroom v. Hook, 563 F.2d 1396 (9th Cir. 1977), the Ninth Circuit held that the 30 day time limit found in section 2000e-16(c) begins to run from the time the plaintiff receives the "right to sue" letter from the agency.

While the Air Force is correct in its conclusion that a district court complaint

must be filed within 30 days of notice of final agency decision, this rule is subject to the requirement that the complainant actually receive notice. The evidence in this case establishes beyond any question that neither the plaintiff nor her attorney received the requisite notice. Thus the jurisdiction of this Court is proper, and attached when she filed her complaint after the lapse of 30 days following the date of lodging her formal complaint with the agency. 42 U.S.C. section 2000e-16(c). Accordingly, the plaintiff's failure to comply with the 30 day limitation period is excused.

In addition to suggesting that plaintiff's federal court action was not timely filed, defendant Air Force further contends that the plaintiff should be foreclosed from prosecuting this action because of her failure to bring her discrimination complaint to the attention of an EEO counselor

within the 30 day time limit prescribed by regulation. See 5 C.F.R. section 713.214(a)(1) (1977); 29 C.F.R. section 1613.214(a)(1)(1979). For the reasons expressed below, these arguments of of the defendant Air Force completely fail to counter or rebut the Title VII claims of plaintiff for retaliatory actions taken against her.

Plaintiff herein should not be held accountable for any technical noncompliance with procedural formalities, however dilatory her actions may appear at first glance. Plaintiff should not be penalized for her misguided reliance on her first attorney, Newton. The Court determined, even before this matter came to trial, that plaintiff was excused for her inaction because of the ineffective assistance of her then counsel, Newton. Moreover, the Air Force received prompt, even premature notice of plaintiff's claims by the

latter's telegrams of April 8, 1977 and July 17, 1977. These telegrams more than satisfy the policy of "equitable extension" of filing periods as articulated in Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980). See also Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978). In Cooper, plaintiff was granted an equitable extension of the period in which to file a discrimination charge because of his reliance on improper advice given to him by a government personnel officer. If the plaintiff's conduct in Cooper is excusable where no discrimination complaint, formal or informal, was filed, then a fortiori the deficiencies in plaintiff's efforts to have her grievance disposed of should be excused. The Air Force simply cannot be said to have been without notice of Mrs. Clemente's charge.

The Air Force was also seriously derelict in its duty to inform plaintiff of

the avenues available to process her complaints. As mentioned above, the plaintiff filed her RIF appeal with the Civil Service Commission and combined her discrimination complaint with the appeal. The case was thus referred by the Commission to the agency to determine under which procedure, as between the RIF appeal system and the discrimination complaints system, this entire matter would be resolved. As provided for in 5 C.F.R. section 772.306(a),

> If the appellant has not been informed of the separate rights of appeal, the Appeals Authority shall refer the matter to the agency so the agency may explain the alternate rights of appeal to the appellant as provided in section 713.236 of Part 713 of this chapter and afford him the opportunity, if appropriate, to elect the avenue of appeal he wishes to pursue.

Paragraph 33 of AFR 40-713 addresses this subject matter:

> Where the basis of a complaint of discrimination is an action which may be appealed directly to the Civil Service Commission the complainant should be informed of the requirement to specify under which part of the regulations the issue of discrimination is to be processed . . .
>
> (2) If the complainant elects to proceed under FPM Chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, including the merits of action, will be reviewed under this regulation.
>
> . . .
>
> b. . . . any investigation requested by the Commission shall be conducted in accordance with the Commission's specific written instructions.

The obvious purpose of these combined regulations is to avoid dual processing of complaints covering the same factual matters.

In accordance with these regulations, the Civil Service Commission directed the Civilian Personnel Office at Vandenberg to gain a written election of procedures from the plaintiff. The Commission's letter of July 18, 1977, states in relevant part:

> Section 772.306 of the Commission's regulations provides that when an allegation of prohibited discrimination is raised in connection with a timely appeal, this Authority shall refer the matter to the agency for an explanation of alternative rights of appeal either under Part 713 or under Part 351 of the regulations and to secure appellant's election in writing.
>
> Please inform appellant that this

> action can be pursued within your agency as a complaint of discrimination under Part 713 of the Civil Service Regulations. Explain in detail how such a complaint is processed to completion, including the role of the counselor, the investigation, the provisions of informal resolution, the notice of proposed disposition, the right of hearing before a complaints examiner assigned by the Civil Service Commission, the recommended decision of the examiner, the final decision of the head of the agency, and the appeal right to the Appeals Review Board of the Commission, and to the U.S. District Court as appropriate. . . .

As clearly indicated by the Commission's directive to the Air Force, the burden was on the latter to secure the written election of procedures from the plaintiff and

inform her, in detail, of the various processing steps. The Air Force failed to execute this duty by first neglecting to explain, in any comprehensible fashion, the alternative procedures available to plaintiff and then failing to gain her written election of procedures despite having received at least two subsequent requests from the FEAA to do so. The consequence of the Air Force's malfeasance was that the plaintiff's appeal was hopelessly lost in administrative limbo until it was ultimately resurrected by her newly retained counsel, Attorney Buynak, and was finally referred to an EEO counselor. Given the complex and incomprehensible maze of procedures and elections sufficient to confound most lawyers and even this Court, plaintiff, a humble civil servant, can hardly be expected to make an informed election of procedure without adequate guidance. Plaintiff's delay in contacting

an EEO counselor is obviously explainable and executed for these reasons alone.

But even more persuasive to this Court than the above-stated reasons is the fact that technical compliance with the 30 day limitation period was actually achieved by plaintiff. Defendants have admitted that the Civilian Personnel Officer is the Chief EEO Counselor. Indirectly, through the FEAA, Civilian Personnel Officer Coady, as declared in his letter to plaintiff of July 26, 1977, actually received Mrs. Clemente's claims within the 30 day time limit for initial contact. It is thus undeniable that the timeliness of plaintiff's claims cannot reasonably be questioned.

Defendants further assert that this Court lacks jurisdiction over plaintiff's RIF appeal and reprisal complaints due to the latter's failure to exhaust her administrative remedies with respect to these claims. This argument of defendants,

however, again misses the mark, inasmuch as the demand to process these claims was made on numerous occasions by Buynak. The Air Force, enabled by its own regulation, had the ability to process all of the claims asserted. As set out in greater detail above, AFR 40-713 provides in pertinent part:

> (2) If the complainant elects to proceed under FPM Chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, including the merits of the action, will be reviewed under this regulation. . . . (emphasis added)

Recently, the Ninth Circuit confirmed in Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982), that the above language is to be interpreted to mean that the substance of the plaintiff's non-EEO claims are to be considered in the review of the EEO claims.

Therefore, the Air Force not only had the ability but the obligation to process all of Mrs. Clemente's claims under this section, and was not limited to her discrimination complaint only. Hence, plaintiff's alleged failure to exhaust her administrative remedies with respect to her RIF and reprisal claims is a deficiency for which the defendant Air Force is solely responsible.

To punish plaintiff for her failure to overcome all of the obstacles the Air Force placed in her path to having her complaints administratively processed would be to create a gross injustice. Plaintiff's plight has not been dissimilar to that of plaintiff in Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978). To borrow the words of Judge Robinson:

> In sum, Bethel reasonably attempted to bring his complaint before the administrative tribunal and it unreasonably

refused to consider his claims. He could have done little more, and the agency could hardly have done less. Id. at 645. Having considered the various defenses raised in opposition to the granting of judgment in favor of plaintiff on her claims and finding no merit in the opposition, it is now necessary to turn to the issue of the appropriate remedy or remedies.

The remedial provisions of Title VII allow for injunctive relief, reinstatement, back pay or "other equitable relief as the court deems appropriate." 42 U.S.C. section 2000e-5(g). The Court finds, as established by expert testimony, that plaintiff, by reason of the retaliatory activities of the defendant Air Force and its employees and agents, has been deprived of an is entitled to back pay of $27,480.24. This award represents the period of July 17, 1977, the effective date

of the RIF, to May 23, 1983, the date of trial. In addition, the evidence at trial demonstrated that had the plaintiff not encountered purposeful and continued retaliatory resistance to her upward mobility, she would presently occupy the station of GS-12, step 4. At least two alternatives can be entertained in assuring that the plaintiff is restored to her "rightful place." First, courts have recognized an award of "front pay," or pay representing the time it would take the plaintiff to train and secure the position he or she was denied as a result of the prohibited conduct. See, James v. Stockham Valves & Fitting Co., 559 F.2d 310 (5th Cir. 1977); Montoya v. Anderson, 511 F.Supp. 523 (D.C. Colo. 1981). Nor does a front pay award granted against the government violate the doctrine of sovereign immunity. Chewning v. Schlesinger, 471 F. Supp. 767 (D.C.D.C. 1979). A second

alternative, in lieu of front pay, is "seniority relief," where the plaintiff is ordered to be put in the position he or she would have occupied but for the illegal conduct. See Franks v. Bowman Transportation, 422 U.S. 747 (1976); Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977). To better facilitate and insure plaintiff's delivery from her present and long-static position, this Court should elect to enforce the latter remedy, and to order the Air Force to place plaintiff in a GS-12, step 4 station. Moreover, because plaintiff may not yet be qualified for this position, the Court should enjoin defendant Air Force to train plaintiff so that her qualifications will match her new assignment.

Plaintiff concedes that interest is unavailable against the government because of the doctrine of sovereign immunity. See Saunders v. Claytor, 629 F.2d 596 (9th Cir.

1980). The Court, however, does find that an award of attorneys fees and costs is appropriate under 42 U.S.C. section 2000e-5(k), since plaintiff has prevailed on the merits. The amount of attorneys fees and costs will be established in a separate hearing to be held at a future date, the Court retaining jurisdiction for this purpose.

In addition to the above, this Court should enjoin defendants from taking further unlawful employment or retaliatory action against plaintiff, and should order that the personnel files of plaintiff for the period of July 17, 1977, to April 21, 1980 be purged by the elimination of all derogatory references to plaintiff and the insertion and substitution of appropriate records of this case and proceeding. Furthermore, this Court should retain and reserve jurisdiction of this case and

proceeding in order to insure the implementation of these orders.

2. Plaintiff's Due Process Claims.

As indicated above, on April 30, 1980, an order was entered by this Court remanding this case to the Air force to administratively process all of plaintiff's complaints. The order provided that plaintiff be permitted to be present at all stages of the administrative process and be represented by her attorney, that she not be questioned without her attorney present and that her attorney receive copies of all written communication involved in the processing.

The defendants, apparently under the pretext of attempting to comply with the Remand Judgment, agreed to produce certain documents, contact witnesses identified to be favorable to the plaintiff and establish an investigation schedule so as to provide notice of when the various steps of the

investigation would proceed. In direct defiance of the Court's Remand Judgment as well as the constant and unambiguous demands of plaintiff's counsel urging them to comply with the same, defendants contumaciously refused to process all but one of plaintiff's complaints, and this in summary fashion. The responsibility for this gross dereliction in duty does not rest solely on any one person but can be attributed, in varying degrees, to the acts and omissions of the six individually named defendants. The record of this matter is replete with examples of Air Force personnel literally turning their heads and stubbornly ignoring the Court's April 30, 1980 Remand Judgment. For example, on April 25, 1980, following the oral orders of this Court which were ultimately memorialized as the Remand Judgment entered by the Court on April 30, 1980, plaintiff's counsel wrote to Civilian Personnel Officer

Phillip Seneschal, encouraging the Base to administratively process plaintiff's complaint and specifically requesting:

(1) full, complete processing of all claims;

(2) a proposed schedule for processing;

(3) an outline of processing steps;

(4) copies of all applicable regulations;

(5) documents requested by motions to produce; and

(6) answers to interrogatories proposed in conformance with the oral orders of Judge Hauk.

Thereafter, defendants' attorney, Osinoff, contacted plaintiff's counsel directing that all communication should be sent directly to him rather than the Air Force. Buynak responded to this directive, citing Owen v. City of Independence, supra, 445 U.S. 622 (1980), and warning that any

further delay in processing would evidence a "wilful intent to extend these proceedings and arbitrarily deny the due process rights of plaintiff." Subsequent to this correspondence the Air Force dispatched an investigator to commence review of plaintiff's discrimination claim only. Upon receiving notification of the Air Force's request for an investigator, Buynak again wrote to Osinoff urging him to have his client fully comply with this Court's Remand Judgment, to which the latter responded that the United States Attorney's Office "has no involvement in administrative proceedings of the Air Force."

Thereafter, Buynak met with Investigator Johnstone outlining plaintiff's complaints and her administrative processing expectations. Johnstone reiterated his intention to investigate the discrimination charge only, and was advised by plaintiff's counsel that any such limitation would be

in violation of the April 30, 1980 Remand Judgment of this Court.

Subsequent to this meeting, Buynak also met with Major Brower and Mr. Seneschal at which time various alternatives were discussed to bring about the processing of the three complaints of plaintiff yet outstanding. The follow-up to this meeting consisted of a confirmation that documents requested by Buynak of Mr. Seneschal would be produced along with a recommendation that plaintiff's three remaining complaints would be directed to the Merit System Protection Board (hereafter "MSPB"). Buynak's request for documents was never fully complied with and the suggestion to process plaintiff's claims through the MSPB proved unproductive, since the latter was not authorized to assume FEAA appeals. [2] Thus, according to Major Brower, no further administrative processing could be afforded.

At approximately the same point in time, Buynak again contacted Investigator Johnstone, requesting a status report on his investigation and pointing out that:

(1) none of plaintiff's witnesses had been contacted or interrogatories sent to them;

(2) interrogatories had not been reviewed with plaintiff's counsel as previously agreed; and

(3) the request for documents and answers were still outstanding.

Without responding to this letter from plaintiff's counsel, Investigator Johnstone on September 22, 1980 forwarded his final Report of Investigation" to the Base Commander finding no discrimination. As is evident, this conclusion was reached by contacting only those witnesses who were hostile to plaintiff's position, ignoring document requests perceived to be crucial by the plaintiff, failing to propound

potentially significant interrogatories and involving plaintiff in the investigation to the least extent possible.

Following the submission of the investigation report to Lieutenant Colonel Pray, Chief of Personnel at Vandenberg, the recommendation of Investigator Johnstone was essentially "rubber stamped" and a "Notice of Proposed Disposition of Discrimination Complaint" issued, proposing cancellation of the complaint. Upon receipt of this notice, Buynak wrote to Lieutenant Colonel Pray, outlining the failures in the processing of plaintiff's claims as required by this Court's oral in-Court remand orders of April 21, 1983, and its written Remand Judgment of April 30, 1983, and requesting combined adjudication of all four claims. This request made specific reference to Air Force Regulations, the constitutional rights of the plaintiff, the orders of this Court and the

decision of Owen v. City of Independence, supra, which was attached, as well as the motion before the Court of Appeals which outlined constitutional violations. This letter was also sent to defendants' counsel and Major Brower.

In lieu of responding to the above correspondence, on November 19, 1980, Colonel Bishop, Base Commander at Vandenberg, issued a "Notice of Final Decision" which cancelled Mrs. Clemente's complaint. Colonel Bishop's final decision concluded that the Air Force was not waiving the thirty day statute of limitations [3] and that the "Air Force has simply in good faith attempted to comply with Judge Hauk's order."

Plaintiff clearly states a cause of action for violations of procedural due process under the Fifth Amendment of the Constitution. These constitutional claims flow from denying plaintiff any opportunity

to be heard on three of her four administrative claims and the disposal of her discrimination claim in a grossly inadequate and highly superficial manner. The remedial basis for claims predicated upon violations of the U.S. Constitution by federal agents is found in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See also, Carlson v. Green, 446 U.S. 14 (1980); Owen v. City of Independence, supra; Jacobsen v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977).

In Bivens, the principle was established that victims of constitutional violations by federal officials have a right to recover damages in federal court despite the absence of any statute conferring such right. In this regard, Bivens actions can be analogized to 42 U.S.C. section 1983, their state action counterpart, which provides:

> Every person, who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the depriviation of any rights, privileges, or immunities secured by the Constitution of laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Section 1983 and Bivens cases have been used interchangeably by the Supreme Court. As stated by Justice White in Butz v. Economou, 4 U.S. 478, 504 (1978);

> The section 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after passage of the Fourteenth Amendment, to enact legislation specifically

> requiring state officials to respond in federal court for their failures to observe the constitutional limitations in their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

The Ninth Circuit, in particular, has urged federal courts to be mindful of the need to be inventive and resourceful in protecting constitutional guarantees. In Jacobsen v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977), the court stated:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of

> government, from the highest to the lowest, are creatures of the law and are bound to obey it . . . .

The Civil Rights Act of 1871 was one of the vehicles whereby Congress sought to enforce the provisions of the then recently enacted Fourteenth Amendment. Congress intended to provide victims of constitutional deprivations a constitutional remedy whereby the state tort remedy, although available in theory, was not available in practice. Thus, section 1983 and Fifth Amendment relief must be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. See Monroe v. Pape, 365 U.S. 103 (1961).

In extending this liability to governmental entities themselves, the United States Supreme Court in Owen v. City of Independence, Missouri, supra, emphasized,

> How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all of our society look for the promotion of liberty, justice, fair and equal treatment and the setting of worthy norms and goals for social conduct' -- were permitted to disavow liability for the injury it has begotten . . . A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. [Citations omitted]

445 U.S. at 651.

. . .

The Court added:

> Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principles of equitable loss-spreading has jointed fault as a factor in distributing the cost of official misconduct.

Id. at 657.

The Court wound up with these thoughts on cost-sharing:

> We believe that today's decision together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the 1983 cause of action: The victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity.

> The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy."

Id.

Upon careful and painstaking review of the evidence and the testimony heard at trial, it is the conclusion of this Court

that the purposefully evasive, imprecise and haphazard manner in which plaintiff's grievances were processed constitute a customary practice and policy of the defendant Air Force. Not overlooking the fact that the Owens decision addressed the issue of a municipality being held liable in a section 1983 action, the issue of a federal sovereign violating its own Constitution is indistinguishable. Accordingly, this Court finds that the federal government is not immune from an action being brought against it as a result of its agents having violated the Fifth Amendment rights of a United States citizen. The Supreme Court has firmly held that "it deems it untenable to draw a distinction for purpose of immunity law between suits brought against state officials under section 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S.

478, 504 (1978). We cannot help but recognize and enforce the natural and logical extension of Butz and Owens, which leads us inescapably to conclude that just as state agencies and state officers are both liable for constitutional violations under 42 U.S.C. section 1983, so also federal agencies and federal officers should be and are liable for constitutional violations under Bivens. [4]

The defendants argue that plaintiff's due process argument is without basis as she has not been deprived of any liberty or property interest within the protections of the Fifth Amendment. The Court, however, takes issue with these contentions. The right to hold specific employment and to follow a chosen career free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment: "property" consisting of the employment itself and "liberty"

consisting of the freedom to follow a chosen career. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

The property interest involved herein is plaintiff's GS-7 position and the liberty interest her Civil Service career. Greene v. McElroy, 360 U.S. 474 (1959); Horn v. MSPB, 684 F.2d 155 (D.C. Cir. 1982); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). The action of the agency and its agents in effectuating the RIF and thereafter not providing plaintiff with a forum in which to contest that action has seriously prejudiced and realistically destroyed her ability to obtain other employment or to properly pursue her Civil Service career. Owen v. City fo Independence, 445 U.S. 622 (1980); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). The Air Force established procedures for evaluating combined RIF appeals and discrimination

complaints as well as complaints of reprisal and reemployment priority rights. See AFR 40-713. See also Nolan v. Cleland, supra. Having once established these procedures, they must be followed or plaintiff's due process rights will be violated. See Vitarelli v. Seaton, 359 U.S. 35 (1959). The Air Force, however, repeatedly failed to abide by these procedures, even after mandatory orders of this Court. A more fundamental and extreme denial of plaintiff's right to be heard cannot be imagined. As stated by Justice Burton in Joint Anti-Facists Refugee Committee v. McGrath, 341 U.S. 123, 162-163 (1951):

> The requirement of "due process" is not a fairweather or timid assurance. It must be respected in times of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a

fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably evolving the exercise of judgment by

those whom the Constitution entrusted with the unfolding of the process. While this Court is thoroughly convinced that the due process rights of plaintiff were violated, there still remain several threshold issues which must be confronted before liability may be imposed.

The first challenge defendants make to plaintiff's due process claims is jurisdictional, arguing that Title VII provides the exclusive remedy to any complaint where discrimination in federal employment is claimed. See Brown v. GSA, 425 U.S. 820, 835 (1976). Defendants also cite the recently decided Supreme Court decision of Bush v. Lucas, 51 U.S.L.W. 4752 (1983), for the proposition that the existence of a Title VII remedy is a "special factor counselling hesitation" or an "adequate alternative remedy" within the meaning of Bivens, thus precluding an award of constitutional damages. The Ninth Circuit has

also had opportunity to decide whether Title VII and Bivens claims could peacefully coexist in Noland v. Cleland 686 F.2d 806 (9th Cir. 1982). As observed by Judge Hoffman in that case:

> The holding of Brown, supra, is controlling on this issue and we feel that such holding cannot be circumvented where the factual predicate for Nolan's due process claim is the discrimination which is the basis of her Title VII claim. The threshold question in Nolan's action is the constructive discharge claim and she would not be able to recover on the due process claim due to the identical factual basis, and, therefore, the district court correctly dismissed the due process count and approached the action solely as a Title VII action pursuant to Brown, supra. (Emphasis added)

Id. at 815. While this Court has been unable to locate a case where Title VII and Bivens actions have been concurrently maintained, it is apparent that the instant action is factually and legally distinguishable from the Brown, Bush and Nolan holdings.

Plaintiff's due process and Title VII claims flow from entirely distinct factual occurrences, involve different individuals and occurred at separate points in time. The substance of the Title VII action dealt with retaliatory activity, the factual basis of which consisted of base officials circumventing their duty of advising plaintiff how to proceed within a complex regulatory system, destroying documents that tended to support claims stated under Title VII, covering up the same, removing plaintiff from her office prematurely and isolating her from her peers. All of this occurred after supervisory and other

personnel became aware of plaintiff's intention to file a discrimination complaint. On the other hand, plaintiff's due process claims arose long after her initial Title VII complaint was filed in district court, this Court had by its Remand Judgment mandated full processing of all of plaintiff's grievances, and entirely different Base officials failed and refused to accomplish the same. By no stretch of the imagination could these due process complaints be considered compensable under Title VII, since no discriminatory basis or retaliatory motive can be shown.

It must follow, therefore, that Title VII does not and cannot provide the exclusive remedy under these circumstances. The coexistence of Bivens and Title VII claims is justified by the clear distinction between the factual contexts in the instant case and the factual contents in the cases which have disallowed concurrent Bivens

constitutional claims and Title VII claims. As we have pointed out, the Brown and Nolan courts could not reconcile constitutional and Title VII claims in the same action when these claims shared the same factual predicate. But this is simply not the case in the instant action where the factual predicates are completely different in time, activities and actors.

With respect to the recent Bush holding, plaintiff, unlike Mr. Bush, is not trying to supplement what she perceives to be an inadequate remedy for the wrong she has suffered. Rather, plaintiff is seeking damages for an entirely independent wrong. Another point of distinction between this action and Bush is that the latter action, the petitioner's constitutional claims were based upon the abridgement of his First Amendment rights. The Court found that retaliatory action for exercising one's First Amendment rights had been prohibited

by the regulatory scheme under which Mr. Bush had proceeded; and since he had already received a viable, adequate and meaningful alternative remedy under that regulatory scheme he was precluded from augmenting that recovery by pursuing a Bivens claim. It would be absurd to suggest that the same rationale could apply to Mrs. Clemente. Obviously the regulatory scheme under which she attempted to proceed does not allow or permit the failure or refusal of its administrators to execute its mandates without giving administrative due process. Thus plaintiff had no viable, adequate or meaningful remedy under the regulations of either the Civil Service or the Air Force to redress the failure and refusal to provide her administrative due process.

Accordingly, this Court holds that Title VII did not provide the exclusive remedy in this case, that plaintiff did not

have a viable, adequate or meaningful alternative remedy, and that the Court has jurisdiction over plaintiff's due process claims.

The defendants' next point of contention deals with immunity from suit. Having already decided that the Air Force is not immune, given the holding of Owens v. City of Independence, 445 U.S. 622 (1980), the question of any immunity of the individual defendants is now taken up.

Initially, defendants assert that they are entitled to absolute immunity under the rationale of Butz v. Economou, supra, 438 U.S. 478 (1978), where a functional approach to immunity was employed. This approach, simply stated, would allow officials, notably judges and prosecutors, to receive a full exemption from liability "because of the special nature of their responsibilities." Id. at 511. This approach was recently upheld by the Supreme

Court in Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982). Upon review of the official duties of the defendants named individually herein, this Court finds that none of these individuals has responsibilities in the administrative process that even approximate that of judge or prosecutor and that the nature of their responsibilities is not so special as to totally shield them from civil liability. See also, Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

While it is evident that the functions of the individual defendants are not sufficiently sensitive so as to entitle them to absolute immunity, the more critical inquiry is whether they should be protected by any qualified immunity. The test for qualified immunity, as articulated in Harlow v. Fitzgerald, supra, is whether the government official claiming immunity violated "clearly established" statutory or constitutional rights of which a reasonable

person would have known while in the course of performing a discretionary function. Id. If the law is clearly established, the immunity defense should generally fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard. Id.

The conduct, or more properly, the refusal to act, of the individual defendants herein evidenced a purposeful, wilful and deliberate disregard of the due process rights of Mrs. Clemente, and contempt for and refusal to obey the Remand Judgment of this Court. Plaintiff's counsel explained in writing and orally, time and again, from April 25, 1980 until June 27, 1980, plaintiff's rights to due process and the obligations of defendants thereunder. Each of the individual defendants was thoroughly informed with respect to Mrs. Clemente's rights and legally justified claims and

demands. A copy of this Court's Judgment, Findings of Fact and Conclusions of Law, the Owens decision and the motion made before the Court of Appeals were all sent to these defendants. How it can now be claimed that the defendants did not know that their conduct was in violation of the administrative due process rights of plaintiff is incredible. It is thus the conclusion of this Court that the individual defendants charged with violations of plaintiff's constitutional rights are not entitled to immunity, qualified or absolute.

Having determined that the plaintiff's due process claims are properly before this Court, it is now necessary to decide upon an appropriate remedy or remedies.

As previously stated, an action for constitutional damages is in the nature of an action in tort, and therefore damages are awardable. Thus, a judgment for

compensatory damages is permissible and appropriate. Bivens v. Six Unknown Federal Narcotics Agents, supra. Evidence was introduced at trial sufficient to demonstrate that plaintiff suffered special damages in the amount of $1,000.00. In addition, it is the conclusion of this Court that plaintiff was damaged generally in the amount of $25,000.00, this amount representing the physical and mental anguish she suffered as a result of her administrative ordeal.

Apart from these damages to compensate plaintiff for the wrongs she suffered, it is also this Court's opinion, finding and conclusion that exemplary damages are necessary to deter these defendants, and others similarly situated, from further engaging in such irresponsible and injurious activity. The recent decision of Smith v. Wade, 51 U.S.L.W. 4407 (1983), provides the legal basis for imposing

punitive damages for official misconduct. The standard for such an award under Smith is a showing of "reckless or callous indifference to the plaintiff's federally protected rights." This standard, indeed, was the watchword here by which all of the defendants seemed to govern their actions toward plaintiff, and thus exemplary damages are both justifiable and appropriate. Punitive damages will be imposed upon each defendant according to his and its degree of responsibility in undermining and flouting the federally protected due process rights of Mrs. Clemente, rights to administrative due process which the defendants arrogantly trampled upon and crushed.

A final issue to be disposed of is the matter of attorneys fees and costs in connection with these constitutional actions and claims. Plaintiff argues that fees and costs should be awarded against

the government under the Equal Access to Justice Act, 28 U.S.C. section 2412(b). This section provides, in effect, that any award of attorney's fees and costs properly chargeable to an individual may be charged to the government under appropriate circumstances. Plaintiff cites the decision of Lauritzen v. Secretary of the Navy, 546 F.Supp. 1221 (C.D.Cal. 1982), for the proposition that an award of attorneys fees in a Bivens action may be analogized to a similar award in a section 1938 action which is authorized by 42 U.S.C. section 1988. Finding the reasoning of Lauritzen to be persuasive, this Court finds an award of attorneys fees and costs incurred in connection with the prosecution of plaintiff's constitutional claims here is appropriate and should be made.

The foregoing shall constitute the findings of fact and conclusions of law as

required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER FOR JUDGMENT

Based on the foregoing, IT IS HEREBY ORDERED THAT

Under Plaintiff's Title Vll Claims, 42 U.S.C. section 2000e, et seq.:

(1) Plaintiff should be awarded back pay in the amount of $27,480.24 pursuant to 42 U.S.C. section 2000e-5(g).

(2) Plaintiff should be promoted to a GS-12, step 4 position and given appropriate training to prepare her for the same under 42 U.S.C. section 2000e-5(g).

(3) Plaintiff should be awarded attorneys fees and costs of suit under 42 U.S.C. section 2000e-5(k) in connection with the prosecution of her Title VII claims in an amount to be determined at a future hearing.

(4) Defendants should be enjoined from taking any further unlawful employment or retaliatory action against plaintiff.

(5) The personnel files of plaintiff for the period of July 17, 1977 to April 21, 1980, should be purged by the elimination of all derogatory references to plaintiff and the insertion and substitution of appropriate records of this case and proceeding.

Under Plaintiff's Constitutional Claims

(6) Plaintiff should be awarded compensatory general and special damages in the amount of $26,000.00.

(7) Exemplary damages and punitive damages should be imposed against the defendant Secretary of the Air Force and the Air Force in the amount of $150,000.00.

(8) Exemplary and punitive damages should be imposed against defendant Ronald J. Bishop, Jr. in the amount of $1,000.00.

(9) Exemplary and punitive damages should be imposed against defendant Harold L. Pray in the amount of $1,000.00.

(10) Exemplary and punitive damages should be imposed against defendant Charles L. Brower in the amount of $2,500.00.

(11) Exemplary and punitive damages should be imposed against defendant Phillip G. Seneschal in the amount of $2,500.00.

(12) Exemplary and punitive damages should be imposed against defendant Harry W. Johnstone in the amount of $2,500.00.

(13) Exemplary and punitive damages should be imposed against defendant Jeffrey W. Cook in the amount of $1,000.00.

(14) Plaintiff should be awarded attorneys fees in connection with the prosecution of her constitutional claims under 28 U.S.C. section 2412(b), as well as costs under 28 U.S.C. section 2412(a), in amounts to be determined at a future hearing. In this connection, and in

accordance with the Court's Order of July 15, 1983, defendants' opposition to plaintiff's application for attorneys fees, expenses and costs should be filed within 30 days after receipt by the U.S. Attorney's office of this Decision and the accompanying Judgment, and counsel for plaintiff and for defendants should confer with the Courtroom Deputy Clerk to obtain the earliest Court hearing date, which date should be noted by defendants' counsel on the Opposition papers title page.

(15) This Court should retain and reserve jurisdiction of this case and proceeding in order to insure the implementation of these orders.

(16) It should be further ordered that the Clerk of Court shall forthwith file and enter this Decision and accompanying Judgment, and serve copies thereof on all counsel of record for all parties herein,

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 12, 1983
2:10 p.m.

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

FOOTNOTES

Footnote 1 Reference page 76

An especially disturbing instance of document destruction and alteration -- a veritable "gate" type of coverup so egregious that this Court quite almost by reflex action termed it the "Vandenberg-gate" episode -- was demonstrated by what happened to Ex. 167, p. 6. This was a photocopy of "Form 52" - "Request For Personnel Action" dated April 13, 1977, by which employees of defendants, having previously made up their collective, if not conspiratorial, minds to retaliate against plaintiff by cancelling out her position as EAM Project Planner (Grade 7) and "busting" or downgrading her to Clerk Typist (Grade 4), attempted to accomplish their planned reprisal.

But this backfired when all the government could produce was this photocopy, which did not even have plaintiff's name on it, was rife with illegible handwritten notations, and covered with blank spaces obviously rendered blank, before photocopying, but the use of opaque tapes and erasures. These outrageous and transparent ex post facto, but ultimately self-defeating, alterations were only the worst of the several efforts made at Vandenberg Air Force Base in the vain undertaking to legitimize the reprisals and retaliatory activity taken against plaintiff. When the government finally had to admit that the original of this Form 52 could not be found because it had probably been destroyed in violation of Air Force rules and

regulations, the misconduct of defendants was sealed.

Footnote 2 Reference page 98

As previously described in greater detail, the combined claims and complaints of plaintiff could have been effectively processed under Air Force Regulations, particularly AFR 40-713, thereby dispensing with the need of an appeal to any outside agency. Rather than looking upon the failure and refusal to process three of plaintiff's claims and complaints as a forced and therefore excusable inability to accomplish the processing under Air Force Regulations, it is the firm conclusion of this Court, following its extensive review of the exhibits in evidence and the testimony at trial, that plaintiff's grievances were all matters with which the Air Force simply, stubbornly, and contemptuously chose not to deal.

Footnote 3 Reference page 101

As the Ninth Circuit, in its unpublished opinion of December 14, 1981, dismissing the earlier appeal of this case, observed:

> Not to be outdone by the confused state of the proceedings, the government seems to have changed theories of defense at every turn. It rejected Mrs. Clemente's first complaint as premature and her second complaint as untimely. Similarly, its brief on appeal argues that Mrs. Clemente's failure to contact an EEOC counselor within 30 days precluded district court jurisdiction, but at oral argument the government contended that her failure to exhaust administrative remedies prevents review. Clemente v. United States of America, et al., No. 80-5508, Slip Op. at 1 (9th Cir. 1981).

Footnote 4 Reference page 110

The Court recognizes that this assertion is directly contrary to justice Powell's dissenting opinion in Owens at 445 U.S. 622, 670 n. 12. However, the principles articulated by the majority in Owen should be and are extended here to the federal government which, as conceded by Justice Powell, has a much greater financial ability to absorb such judgments than a municipal government. Id. at 670.

FILED Aug 12, 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOWENE R. CLEMENTE, Plaintiff, -v- UNITED STATES OF AMERICA, and UNITED STATES AIR FORCE, a military department of the United States of America, with HANS M. MARK, Secretary; RONALD J. BISHOP, JR., HAROLD L. PRAY, CHARLES L. BROWER, PHILLIP G. SENESCHAL, HARRY W. JOHNSTONE, and JEFFREY W. COOK, individually and as officers and/or employees of the United States Air Force, Defendants.	No. CV-80-5746 AAH JUDGMENT (For Plaintiff and Against Defendants)

The above entitled matter came on regularly for non-jury trial in this Court on May 23, 1983, and continued from day to day thereafter for 19 days until June 21, 1983, whereupon argument was heard upon the matter, including facts and law, for two hours on each side. Thereafter the Court took the matter under consideration and submission and now after having made, signed and entered its Decision, including its finings of fact, conclusions of law and Order for judgment renders its Judgment:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

Under Plaintiff's Title VII Claims, 43 U.S.C. section 2000e, et seq.

1. Plaintiff shall have and recover against and from defendant, Hans M. Mark, Secretary of the Department of the Untied States Air Force (Secretary), the sum of $27,480.24, awarded as and for back pay, 42 U.S.C. section 2000e-5(g).

2. Defendant Secretary shall forthwith promote plaintiff to the GS-12, step 4, position, and shall give her appropriate training so that she can be prepared to be designated to and adequately fulfill the duties of such position, 42 U.S.C. section 2000e-5(g).

3. Defendant Secretary is prohibited and enjoined from taking any or further unlawful employment or retaliatory action against plaintiff.

4. Defendant Secretary shall forthwith purge and eliminate from plaintiff's personnel file or files covering the period July 17, 1977, to and including April 21, 1980, all derogatory references to plaintiff, and shall insert and substitute in said files covering said period appropriate records of this case and proceeding, to wit, the Decision and Judgment herein made, signed, filed and entered.

5. Plaintiff shall have and recover from defendant Secretary her reasonable attorney's fees as part of costs hereby awarded to plaintiff in connection with the prosecution of her Title VII claims, 42 U.S.C. section 2000e-5(k), which fees and costs will be determined by the Court at a future hearing to be set in accordance with the procedures hereinafter in paragraph 8 set forth.

Under Plaintiff's Constitutional Due Process Claims

6. Plaintiff shall have and recover against and from defendants Secretary of the Air Force, United States of America (U.S.A.), and United States Air Force (U.S.A.F.), and all the other named defendants, the sum of $26,000.00, awarded as and for compensatory damages.

7. Plaintiff shall have and recover against the following named defendants the

following sums, awarded as and for punitive and exemplary damages:

(a) defendant Secretary of the Air Force, U.S.A., and U.S.A.F. - 150,000.00

(b) defendant Ronald J. Bishop - $1,000.00

(c) defendant Harold L. Pray - $1,000.00

(d) defendant Charles L. Brower - $2,500.00

(e) defendant Phillip G. Seneschal - $2,500.00

(f) defendant Harry W. Johnstone - $2,500.00

(g) defendant Jeffrey W. Cook - $1,000.00

8. Plaintiff shall have and recover against and from defendants Secretary of the Air Force, U.S.A. and U.S.A.F., and other named defendants herein, reasonable attorneys fees and expenses in connection

with the prosecution of her constitutional due process claims, 28 U.S.C. section 2412(b) and (d), as well as costs under 28 U.S.C. section 2412(a) as enumerated in 28 U.S.C. section 1920 in amounts to be determined at a future hearing. In this connection, and in accordance with the Court's order of July 5, 1982, defendants' opposition to plaintiff's Application for attorneys fees, expenses and costs of suit shall be filed and served within 30 days after receipt by the United States Attorney's Office of this Judgment and accompanying Decision, and counsel for plaintiff and counsel for defendants shall confer with the Courtroom Deputy Clerk to obtain the earliest Court hearing date, which date shall be noted by defendants' counsel on the Opposition papers title page.

Under Both Sets of Plaintiff's Claims

9. This Court retains and reserves jurisdiction over this case and proceeding

to insure implementation of its Judgment and Orders herein.

10. The Clerk of the Court shall forthwith file and enter this judgment and accompanying Decision, and serve copies thereof upon all counsel of record for all parties herein.

Dated: August 12, 1983

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE
2:12 p.m.

FILED
DEC 14, 1984
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOWENE R. CLEMENTE,	)	
	)	
Plaintiff-Appellee,	)	No. 80-5508
	)	
vs.	)	DC No. 79-3952-AAH(Sx)
	)	
UNITED STATES OF AMERICA; and UNITED STATES AIR FORCE, a military department of the United States of America, with HANS M. MARK, Secretary,	)	MEMORANDUM
	)	
Defendants-Appellants.	)	

Appeal from the United States
District Court
For the Central District of California
Chief Justice Judge A. Andrew Hauk,
Presiding

[Argued and Submitted November 6, 1981]

Before: WRIGHT, WALLACE and ANDERSON, Circuit Judges.

Mrs. Clemente first challenged her job reassignment on April 8, 1977. By the time of oral argument in this court, her action had been rejected twice by the Air Force, and actions were pending both in this court and the district court.

Not to be outdone by the confused state of the proceedings, the government seems to have changed theories of defense at every turn. It rejected Mrs. Clemente's first complaint as premature and her second complaint as untimely. Similarly, its brief on appeal argues that Mrs. Clemente's failure to contact an EEOC counselor within 30 days precluded district court jurisdiction, but at oral argument the government contended that her failure to exhaust administrative remedies prevents review.

Mrs. Clemente's contentions also have lacked consistency. Her first challenge alleged a discriminatory RIF action, while her latest district court complaint includes constitutional claims as well.

This description of the case makes clear that we lack jurisdiction to review the merits of this appeal. The district court remanded these issues for administrative processing, apparently not considering them final and appealable. Consequently, several of the claims and defenses now before us have yet to be evaluated below.

Without such a consideration by the district court, these issues are not ripe for review in this court. They require refinement in light of any additional underlying facts, which may develop if the district court deems further hearings necessary. See SEC v. Lincoln Thrift Ass'n, 557 F.2d 1274, 1279 (9th Cir. 1977).

Those defenses already rejected and those claims already determined, in light of the peculiar posture of this case, fail sufficiently to dispose of the entire action. We do not find the necessary finality to permit our review. 28 U.S.C. section 1291; see Cobbledick v. United States, 309 U.S. 323 (1940); Branch v. Phillips Petroleum Co., 638 F.2d 877 (5th Cir. 1981).

We remand to the district court where, at the discretion of the judge and as appropriate, all of the appellee's claims will be considered and each of appellant's defenses will be evaluated. The district court should determine, as it deems appropriate, whether: (1) Mrs. Clemente's complaint should be dismissed for failure to exhaust administrative remedies; (2) her failure to comply with applicable statutory or administrative filing time limits should be excused; (3) the district court has

jurisdiction to hear the various issues, considering that the government continues to claim that an untimely initial contact with an EEOC counselor is a jurisdictional defect; (4) the court's prior remand order retains vitality, and if so, whether the Air Force complied; and (5) other issues should be determined or further hearings conducted.

After whatever proceedings the district judge considers necessary and appropriate, the judge will render a final decision. Only then can this court conduct a meaningful review.

The district court's remand order granted attorneys' fees of $2,500 to plaintiff's attorney. We vacate the award of attorneys' fees. Hanrahan v. Hampton, 446 U.S. 754 (1980; cf. Manhart v. City of Los Angeles, 652 F.2d 904, 906-07 (9th Cir. 1981) (Title VII of plaintiff who secures injunctive relief is a prevailing party).

Mrs. Clemente has yet to prevail on the merits of any of her claims, but only has succeeded in preserving a cause of action. If Mrs. Clemente eventually prevails, any award of attorneys' fees will require consideration of the guidelines announced by this court in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976).

We dismiss the appeal in part and vacate the portion of the district court's order awarding attorneys fees.

FILED April 30, 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOWENE R. CLEMENTE, Plaintiff, UNITED STATES OF AMERICA, and UNITED STATES AIR FORCE, a military department of the United States of America, with HANS M. MARK, Secretary, Defendants.	No. CV-79-3952-AAH(Sx) DECISION AND ORDER REMANDING CASE AND DISMISSAL WITHOUT PREJUDICE

The Motion of Defendants to Dismiss this action, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction, came

on regularly for hearing before the Honorable A. ANDREW HAUK, United States District Judge, on the 21st date of April, 1980. The Plaintiff LOWENE R. CLEMENTE appeared and was represented by her attorney, S. TIMOTHY BUYNAK, JR.; and Defendants appeared through their attorney, ANDREA SHERIDAN ORDIN, United States Attorney, FREDERICK M. BROSIO, JR., Assistant United States Attorney, Chief, Civil Division, and PETER R. OSINOFF, Assistant United States Attorney, by PETER R. OSINOFF.

FINDINGS OF FACT

The Court, having considered the pleadings herein, the Certified Administrative Record, the Memoranda and Declarations submitted by both sides, and having heard oral argument of counsel, finds that:

1. Plaintiff's failure to discuss her case with an EEO Counsellor is not a jurisdictional defect;

2. Defendants through their personnel at Vandenberg Air Force Base, California, had an affirmative duty to timely refer Plaintiff's complaints to an EEO Counsellor for consideration and to fully advise Plaintiff of the administrative processing requirement and her rights therein, which Defendants failed to accomplish, although Plaintiff has been consistently employed at Vandenberg Air Force Base, California, since lodging her complaints;

3. Because of these failures by Defendants, Plaintiff's complaints were never accepted and processed administratively in accordance with Defendants' regulations, which processing would aid immensely in the resolution of the difficulties herein considered, which failure constituted and constitute arbitrary, capricious and unreasonable denial of the due process of law rights of Plaintiff.

4. Jurisdiction of this Court to hear discrimination complaints under 42 United States Code section 2000e-16 terminates thirty days after receipt of the final notice of agency determination by the Plaintiff; otherwise, this Court has continuing jurisdiction to entertain the judicial complaint herein, beginning 180 days after Plaintiff filed her formal initial charge with the agency;

5. Notice of the final agency determination was never received by Plaintiff. Defendant Air Force, in violation of its own regulations (A.F.R. 40-713, October 20, 1975, Par. 23e.), failed to send to Plaintiff and her representative a written decision by certified mail, return receipt requested. And because 180 days have elapsed between the filing of Plaintiff's formal initial charge and the filing of the complaint herein, this Court has continuing jurisdiction.

6. Any conclusion of law deemed as or properly constituting a finding of fact is hereby adopted as a finding of fact.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action.

2. Defendants' Motion to Dismiss for lack of subject matter jurisdiction should be denied.

3. In the interest of justice and fairness to all parties, the complaints of Plaintiff as presented herein should be remanded to the Civilian Personnel Office of Vandenberg Air Force Base, California, for continuous and diligent administrative processing by the Defendants under applicable Air Force regulations to final determination by the Defendant Air Force and the other said Defendants, all of said processing to be initiated within sixty (60) days

of the date of entry of the within Decision and Order.

4. Said processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative processing entailed therein, and should be conducted so as to insure plaintiff her full rights in said proceedings and a fair adjudication of her complaints.

5. In addition to said rights and privileges afforded by said regulations, Plaintiff should be entitled to be present at all states of the administrative processing and to be represented thereat by her legal representative.

6. Plaintiff should not be questioned at any time without her legal representative being present and Plaintiff's legal representative should receive copies of all written communications involved in this administrative processing.

7. If the defendants fail to initiate the said administrative processing within sixty (60) days from the date of entry of the within Decision and Order, or to fully, properly and diligently process said complaints of Plaintiff through all stages to final determination by the Air Force, this Court, upon motion by Plaintiff, should consider reopening of this proceeding herein and granting the relief prayed by the Plaintiff in her Complaint on file herein.

8. This proceeding and the complaint herein should be dismissed without prejudice to:

(a) the reopening of this proceeding upon motion of Plaintiff if the Defendants fail to initiate said administrative processing within sixty (60) days from the date of entry of this Decision and Order, or fail to fully, properly and diligently carry on said processing to

final administrative determination in strict compliance with the regulations of Defendant Air Force; or

(b) the filing by Plaintiff of a new complaint for review of the said administrative processing and final determination if Plaintiff is dissatisfied or has good legal cause to complain and seek judicial review of any portion of said administrative processing or final determination.

9. Any finding of fact deemed as or properly constituting a conclusion of law is hereby adopted as a conclusion of law.

10. The Clerk of this Court should forthwith serve copies of this Decision and Order upon counsel for all parties herein.

ORDER

Let Judgment be entered accordingly.

Dated: April 30, 1980

/s/ A. Andrew Hauk
A. ANDERW HAUK
UNITED STATES DISTRICT
COURT

FILED April 30, 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOWENE R. CLEMENTE, Plaintiff, -v- UNITED STATES OF AMERICA, and UNITED STATES AIR FORCE, a military department of the United States of America, with HANS M. MARK, Secretary Defendants.	)	No. CV-79-3952-AAH(Sx) JUDGMENT REMANDING PROCEEDING FOR ADMINISTRATIVE PROCESSING, AND DISMISSING COMPLAINT WITHOUT PREJUDICE TO REOPENING OR TO FILING OF NEW COMPLAINT

The Court having made and entered its Decision and Order Remanding Case and for

Dismissal Without Prejudice in this matter, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' Motion to Dismiss for lack of subject matter jurisdiction is denied.

2. The case and proceeding herein is remanded to Defendant Air Force, and the other Defendants, and particularly to the Civilian Personnel Office of Vandenberg Air Force Base, California, for continuous and diligent administrative processing by Defendants under applicable Air Force regulations to final determination by the Defendant Air Force and the other said Defendants, such processing to be initiated within sixty (60) days of the entry of the aforesaid Decision and Order and the within Judgment.

3. The Court reserves its jurisdiction and right to reopen the within

proceeding, upon motion of Plaintiff, if Defendants fail to initiate the said administrative processing within said sixty (60) day period, or fail to fully, properly and diligently process Plaintiff's complaints through all stages to final determination by the Defendant Air Force, in strict compliance with its regulations.

4. This proceeding and the complaint herein are hereby dismissed, but without prejudice to:

(a) the reopening of this proceeding upon motion of Plaintiff if the Defendants fail to initiate said administrative processing within sixty (60) days from the date of entry of this Judgment, or fail to fully, properly and diligently carry on said processing to final administrative determination in strict compliance with the regulations of Defendant Air Force; or

(b) the filing by Plaintiff of a new complaint for review of the said administrative processing and final determination if Plaintiff is dissatisfied or has good legal cause to complain and seek judicial review of any portion of said administrative processing or final determination.

5. Plaintiff shall have and receive her costs of suit incurred herein which are hereby taxed in the amount of $_____, and her reasonable attorney's fees which are hereby determined and fixed in the amount of Twenty Five Hundred Dollars ($2,500.00), all pursuant to 42 United States Code section 2000e-5(k).

6. The Clerk shall forthwith serve copies of this Judgment and the aforesaid Decision and Order upon counsel for all

parties herein.

Dated: April 30, 1980

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 4392D AEROSPACE
SUPPORT GROUP (SAC)
VANDENBERG AIR FORCE BASE, CALIFORNIA 93437

12 May 1977

Reply to
Attn of: DPCD

Subject: Notice of Reduction in Force - Job Offer

To: 65961S/DOU/Lowene R. Clemente

1. We regert to advise you that a reduction-in-force will require your release from your competitive level. The reason for the reduction in force is: The recent acquisition of Olivetti Word Processing equipment has resulted in a reorganization in the Data Processing Section. The requirement for an EAM Project Planner no longer exists. Therefore, the position you now occupy has been identified to be abolished.

2. Your retention rights have been compared with other base employees to determine the best available position that can be offered to you. You are offered the position of Computer Operator, GS-332-06, 4392ASG/LGS. If you accept this offer, you will be changed to lower grade to the position not earlier than 17 Jul 1977. If you decline the position you will be separated on 15 Jul 1977.

3. The following information was used in determining your retention rights:

a. Competitive Area: Vandenberg, AFB, Ca.

b. Your Competitive Level is: GS-362-07P

c. Your position is: EAM Project Planner

d. Your Retention Subgroup is: IB

e. Your Service Computation Date is: 1960-03-05

4. If you have any reason to believe the above information is incorrect or if you wish to review regulations or reduction in force records, please call Mrs. Leidecker, 276-4714. She will be glad to answer your questions and assist you in any way possible. Records are available in the Civilian Personnel Office, Bldg. 12777.

5. Should you be separated, you may be entitled to severance pay, employment assistance and other benefits. Attached is a summary of benefits and assistance available in your case. Also attached is an explanation of your right to appeal if, after review, you feel that appropriate regulations have not been followed.

6. You must accept or refuse the position offered within five workdays after receipt of this notice. If you refuse the position or fail to reply within the time limit, you will be separated by reduction in force on the date specified above. If special circumstances warrant, you may make a written request for extension of the notice period to allow retention in a leave without pay status beyond that date.

7. We sincerely regret the need for this action. It does not, of course, reflect in any way on your conduct or performance. You will be continued in a pay status during the notice period and we will try to give you whatever assistance you may need.

WILLIAM M. COADY
Chief, Civilian
Personnel Branch

2 attachments
1. Appeal Rights
2. Supplemental Information

Receipt acknowledged:

Lowene R. Clemente 5/13/77

( ) I accept the offer contained in paragraph 1 of this letter.

( ) I decline the offer contained in paragraph 1 and understand I will be separated from Air Force employment on the date set in paragraph 2 of this letter.

NAME DATE

APPEAL RIGHTS

1. You have the rights to review all records pertaining to this action and to see copies of Air Force and Civil Service regulations pertaining to Reduction in Force. This includes the retention register for your competitive level and those for other positions for which you believe you are qualified, down to and including those in the same or equivalent grade (if any) which constitutes your "best offer." If separation is proposed, this includes all positions equal to, and below, the grade of your current position.

2. If, after this review, you believe that the provisions of Air Force or Civil Services regulations (specifically AFR 40-351 and FPM, Chapter 351) have not been followed, you should discuss any questions you have with a member of the Civilian Personnel Office staff. If, after such discussion, you still believe that the action does not comply with regulations, you may submit an appeal to the Civil Service Commission. The appeal may be submitted at any time after receipt of this notice, but not later than 15 calendar days after the effective date of the action.

3. If you are separated by reduction in force and are eligible for the reemployment priority list (RPL), you may request, during your period of eligibility, to review records of position vacancies at Air Force activities in the locality which were filled by other than Air Force employees. If you belief that you should have been offered a vacancy instead of a person appointed or transferred, you should discuss the action with an appropriate

member of the Civilian Personnel Office. If, after discussion, you disagree with an action, you may submit an appeal to the Civil Service Commission.

4. Any appeal from this reduction in force action, or subsequent action while you have reemployment priority, should be addressed to:

United States Civil Service Commission
Federal Employee Appeals Authority
San Francisco Field Office
450 Golden Gate Ave
San Francisco, CA 94102

A copy of this notice should be included with the appeal letter.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 4392D AEROSPACE
SUPPORT GROUP (SAC)
VANDENBERG AIR FORCE BASE, CALIFORNIA 93437

19 NOV 1980

Reply to
Attn of: CC

Subject: Notice of Final Air Force Decision - Lowene R. Clemente

To: S. Timothy Buynak
Hatch and Parent
21 East Carrillo Street
Santa Barbara, CA 93101

1. By letter, dated 17 October 1980, which you received 22 October 1980, Lt Col Harold L. Pray, Chief, Personnel Division, proposed to adopt the findings of Mr Harry W. Johnstone in his report of investigation into Ms Clemente's case. Mr Johnstone found that the complainant's race was not a factor in the decision to abolish her position or in the manner in which she was treated incident thereto. Lt Col Pray proposed cancellation of the complaint.

2. In that 17 October letter you were informed that if you are dissatisfied with the proposed disposition, you may (1) request a hearing before an Equal Employment Opportunity Commission (EEOC) Complaints Examiner, followed by a decision by the Air Force Director of EEO, or (2) request a decision by the Air Force Director of EEO, without a hearing, based upon the evidence present in the complaint file.

Lt Col Pray further explained to you that such a request should be submitted to Ms Carolyn McCool, the Chief EEO Counselor at Vandenberg, within 15 calendar days of receipt of the Notice of Proposed Decision.

3. As of this date you have neither notified Ms McCool of your desire for an EEOC hearing, nor have you informed Lt Col Pray of your specific wishes. Rather, in your 31 October 1980 reply to the Notice of Proposed Disposition -- a reply which, incidentally, did not reach Lt Col Pray or Major Brower until 7 November 1980, "16 calendar days after your receipt of the Notice of Proposed Disposition -- you reject the EEOC hearing on the erroneous belief that its scope would be limited to the scope of Mr. Johnstone's evaluation, and you inform Lt Col Pray that he may, at his "option," make a final agency decision or forward the case to the Air Force Director of EEO "or whomever you like." Neither Lt Col Pray nor I can make this decision for you. That is an election which, as was explained in the 17 October 1980 letter, you and your client must make.

4. In view of the fact that you have failed to make the election offered in the 17 October 1980 letter, as well as the fact that your reply to the 17 October 1980 letter was late, this letter will provide notice to you that I have adopted the proposed disposition, i.e., cancellation of the complaint., as the final Air Force decision in Ms Clemente's case. You now have the following options:

a. You may appeal to the Equal Employment Opportunity Commission within 20 calendar days of receipt of this decision. Your appeal to the Commission should be

addressed to the Director, Office of Appeals and Review, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, DC 20506. The appeal and any representation in support thereof must be submitted in duplicate.

(1) Except as provided in the following paragraph of this letter, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the Air Force Notice of Final Decision and his/her complaint. An appeal shall be deemed filed on the date it is postmarked or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the Air Force within 30 days of filing the Notice of Appeal.

(2) The 20-day time limit within which a Notice of Appeal must be filed will not be extended by the Commission unless, based upon a written showing by the complaint that he/she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his/her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the appeal.

b. In lieu of an appeal to the Commission, you may in accordance with Judge Hauk's remand order, file in U.S. District Court for the Central District of California a new complaint for review of this administrative processing. It is the Air Force's view that such a complaint must be filed within 30 days of your receipt of this final decision. If you elect to

appeal to the Commission's Office of Appeals and Review, you may file your complaint within 30 days of receipt of the decision.

(1) A civil action may also be filed anytime after 180 days of the date of initial appeal to the Commission, if a final decision has not been rendered.

5. I should also like to comment on misconceptions you seem to hold as indicated by your 31 October 1980 reply. First, it is not true that the EEOC hearing is limited to the scope of Mr. Johnstone's investigation, and at no time has either Major Brower, Lt Col Pray, Mr. Phillip Seneschal or Mr Johnstone held that opinion. Rather, Title 29 CFR Part 1613, which prescribes the rules for such hearings, allows a Complaints Examiner to expand the scope of the hearing by either remanding to the agency for further investigation or by arranging for the appearance of additional witnesses. 29 CFR 1613.218. Second, you are mistaken in your belief that Mr. Johnstone considers the RIF to be unsupported. He has made no such assertion either in his report or off the record. Third, you continue to insist that Ms Clemente is entitled to a "combined hearing on all of her complaints," i.e. the RIF appeal, discrimination claim, post-RIF priority rights grievance and reprisal complaint. This argument ignores the fact that Ms Clemente's formal EEO complaint, which provides the basis for Part 713 processing, very simply alleges that the "RIF action taken [was] a result of reverse racial discrimination." Mr Johnstone's investigation appropriately focused on that limited allegation.

6. Regarding your 10 November 1980 request to "initiate processing through (the MSPB)," as you are already aware, the Air Force position on this matter is that the MSPB has no jurisdiction to hear your case, even if it does, you, not the Air Force, must file your own petition with the MSPB. MSPB made this clear to you in its 29 October 1980 letter to you.

7. Finally, I must remind you that throughout this administrative process the Air Force has acted, and continues to act, under compulsion of court order. The Air Force continues to assert that Ms Clemente's complaint is untimely inasmuch as it was not filed within the 30 days prescribed by 5 CFR Part 713 (now 29 CFR Part 1613). Therefore, nothing in this letter, or in any previous correspondence or investigation, should be interpreted as a waiver of the 30-day statute of limitations. The Air Force has simply in good faith attempted to comply with Judge Hauk's order.

RONALD J. BISHOP, JR.
Colonel, USAF Commander

Cy to: Carolyn McCool
4392 AEROSG/JA
(Major Brower)
Ms Clemente
Mr Peter Osinoff,
(Asst U.S.
Attorney)

APPENDIX C

Aug 16, 1985
MANDATE ISSUED
ARMS UNIT
Aug 19, 1985

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOWENE R. CLEMENTE,	)	
	)	
Plaintiff-Appellee,	)	83-6187
	)	83-6188
vs.	)	No. 83-6430
	)	
UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, ET AL.,	)	CV 80-5746
	)	79-3952
	)	80-5746
	)	
Defendants-Appellants.	)	

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said district Court in this Cause be, and hereby is REVERSED, VACATED AND REMANDED.

Filed and entered July 24, 1985

APPENDIX D

33. Relationship to Appeal and Grievance Procedures:

a. When the basis of a complaint of discrimination is an action which may be appealed directly to the Civil Service Commission (for example, reduction-in-force and certain adverse actions) the complainant should be informed of the requirement to specify under which part of the regulations (FPM Chapter 713 or the other appeal system) the issue of discrimination is to be processed.

(1) If the complainant decides to proceed by appeal to the Commission, he must make this election in writing, signed and dated, and a copy is furnished to the Commission office having jurisdiction over the appeal and the activity will close out the discrimination complaint and thereafter

act in the matter under instructions from the Commission.

(2) If the complainant elects to proceed under FPM chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, including the merits of the action, will be reviewed under this regulation.

b. If an allegation of discrimination is made in connection with a matter that already has been appealed to the Civil Service Commission, the activity must notify the Commission's appellate office and that office will determine whether the agency will make an investigation. Any investigation requested by the Commission shall be conducted in accordance with the Commission's specific written instructions.

c. When an employee makes an allegation of discrimination in connection with a matter that would normally be subject to

the Air Force grievance system, the matter will be processed under this regulation (see also AFR 40-771, section C).

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-638

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOWENE R. CLEMENTE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

Page

Cases:

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 2

Block v. *North Dakota*, 461 U.S. 273 4

Brown v. *GSA*, 425 U.S. 820 4

Bush v. *Lucas*, 462 U.S. 367 ..... 3, 5

Butz v. *Economou*, 438 U.S. 478 4

Fitzgerald v. *Hampton*, 467 F.2d 755 5

Owen v. *City of Independence*, 445 U.S. 622 ..... 4, 5

United States v. *Hopkins*, 427 U.S. 123 4

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 4

Civil Rights Act of 1964, Tit. VII 42 U.S.C. 2000e *et seq.* 2, 3

42 U.S.C. 1983 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-638

LOWENE R. CLEMENTE, PETITIONER

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that she is entitled to bring a *Bivens* action against the United States and the respondent federal officials on the ground that several of the respondent officials allegedly incorrectly processed her employment discrimination claim.

1. a. In May 1977, petitioner, a federal employee assigned to the data processing section at the Vandenberg Air Force Base in California, was released from her competitive civil service position because a modernization in the data processing equipment used at the base rendered that position obsolete. Petitioner was offered and she accepted a different position that was one grade below her former civil service level. However, petitioner also sought to pursue her administrative remedies, claiming, inter alia, that she was a victim of racial discrimination. In March 1979, the Air Force rejected petitioner's claim on the ground that her complaint was untimely. Pet. App. 4-5, 41-51, 165-166.

In October 1979, petitioner filed suit in the United States District Court for the Central District of California against the United States, the Department of the Air Force, and the Secretary of the Air Force, raising her racial discrimination claim among others. In April 1980, the district court held that petitioner's failure to pursue her administrative remedies in a timely fashion should be excused, and the court remanded the case to the base personnel office with instructions to process petitioner's claims (Pet. App. 151-164; 488 F. Supp. 854). Defendants appealed, but the court of appeals dismissed the appeal on the ground that the district court's order was not final for purposes of 28 U.S.C. 1291 (Pet. App. 145-150).[1]

b. On remand, the Air Force conducted an investigation and ultimately concluded that petitioner's claim of discrimination was groundless. Petitioner thereafter reopened her original suit by amending her complaint to include several new defendants and to assert *Bivens* claims against both the original and the newly-added defendants. See *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971). Petitioner claimed that the individual defendants had violated her due process rights by limiting their investigation to her complaint of discrimination and by conducting an allegedly perfunctory investigation of that complaint. Pet. App. 12-13, 62-70.

Following a bench trial, the district court rejected petitioner's claim that she was the victim of discrimination, but held that petitioner's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, were violated, on the ground that respondents had retaliated against her for having filed her discrimination complaint (Pet. App.

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[1]However, the court of appeals vacated the district court's award of attorneys' fees to petitioner, on the ground that petitioner was not a prevailing party (Pet. App. 149-150).

72-78; 568 F. Supp. 1150). The court further held that petitioner's due process rights were also violated because respondents had limited their investigation to petitioner's complaint of discrimination, which, the court stated, was inconsistent with the court's April 1980 order (Pet. App. 94-114). The court awarded petitioner compensatory damages, punitive damages, attorneys' fees, and costs against the United States and the individual respondents (*id.* at 123-126, 128-130, 141-143). Respondents then filed a notice of appeal and moved in the district court for a stay of that court's judgment pending appeal. While respondent's motion was pending, the district court issued an order to show cause why respondents should not be held in contempt and later entered an order simultaneously denying respondents' motion for a stay and holding respondents in contempt. *Id.* at 29-30.

c. The court of appeals reversed the district court's judgment in all respects, vacated the award of compensatory and punitive damages, the contempt citation, and the award of attorneys' fees and costs, and remanded petitioner's Title VII retaliation claim to the district court for further proceedings (Pet. App. 1-37; 766 F.2d 1358). The court held that sovereign immunity barred petitioner's *Bivens* claim against the United States (Pet. App. 14-17) and also held that petitioner could not bring a *Bivens* action against the respondent federal officials because the available civil service remedies foreclosed any *Bivens* claim (*id.* at 18-19, citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)). The court held in addition that petitioner had no liberty or property interest in the correct processing of her employment discrimination complaint (Pet. App. 19-25). Finally, the court noted that, to the extent that petitioner's claims stemmed from actions forbidden by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, petitioner's *Bivens* claims

were also foreclosed by *Brown* v. *GSA*, 425 U.S. 820 (1976), which held that Title VII provides the exclusive remedy for claims of federal employment discrimination (Pet. App. 34 n.7).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no issue that warrants review by this Court.

Relying chiefly upon *Owen* v. *City of Independence*, 445 U.S. 622 (1980), and *Butz* v. *Economou*, 438 U.S. 478 (1978), petitioner claims that she is entitled to bring a *Bivens* action against the United States and the respondent federal officials on the ground that these officials processed her employment discrimination claim in violation of the district court's April 1980 order and the applicable Air Force regulations. The court of appeals correctly rejected this insubstantial claim.

Petitioner's claim that she is entitled to bring a *Bivens* suit against the United States to recover damages for the allegedly improper administrative processing of her employment discrimination complaint is without merit for several reasons. First, it is settled law that only Congress has the authority to waive the sovereign immunity of the United States. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). It necessarily follows that the federal courts may not supplement the relief that Congress has prescribed by deriving a *Bivens* remedy for an alleged violation of the Due Process Clause; in fact, *Economou* recognized that *Bivens* remedies have been created against federal officials largely because sovereign immunity would normally bar a damages remedy against the United States. 438 U.S. at 504-505. There is also no merit to petitioner's suggestion that the Due Process Clause itself constitutes a waiver of sovereign immunity and thereby entitles her to monetary relief from the United States for a due process violation. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Lastly, the court of

appeals correctly held (Pet. App. 16, 33-34 n.5) that nothing in *Owen,* which involved a claim for damages under 42 U.S.C. 1983 against a municipality, purports to hold the United States liable for damages in the absence of an express waiver of its sovereign immunity.

The court of appeals also correctly ruled (Pet. App. 18-19) that *Bush* v. *Lucas,* 462 U.S. 367 (1983), forecloses petitioner's *Bivens* claims against any of the respondents in this case. *Bush* held that the comprehensive substantive and procedural provisions devised by Congress to govern the federal employment relationship made it inappropriate to supplement those remedies by creating a *Bivens* action for constitutional violations. Petitioner has set forth no persuasive reason why *Bush* is not controlling here. In addition, petitioner's claim (Pet. 31-32) that she has a liberty or property interest in the administrative procedures used by the Air Force to resolve her employment discrimination claim was correctly rejected by the court of appeals (Pet. App. 19-25), and that ruling does not conflict with the decision of any other court of appeals.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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[2]Petitioner erroneously asserts (Pet. 27-28) that the court of appeals' decision conflicts with *Fitzgerald* v. *Hampton,* 467 F.2d 755 (D.C. Cir. 1972) (en banc). *Fitzgerald* simply held that a former government employee was entitled to a public hearing on his claim that he was illegally fired and did not suggest that the employee could bring a *Bivens* action against the United States or individual federal officials.

DOJ-1985-12

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-638

LOWENE R. CLEMENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

S. TIMOTHY BUYNAK, JR.
HATCH AND PARENT
21 E. Carrillo Street
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(805) 963-9231

Attorneys for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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LOWENE R. CLEMENTE,	)
	)
Petitioner,	)
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TABLE OF CONTENTS

	Page
REPLY BRIEF OF PETITIONER	1
CERTIFICATE OF SERVICE BY MAIL	5

TABLE OF AUTHORITIES

Case	Page
Fitzgerald v. Hampton 467 F.2d 755 (D.C. Cir. 1972)	2,3,4
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	3
Owen v. City of Independence, Missouri, 445 U.S. 622 (1980)	3,4

Contrary to the assertions of the opposition to the Petition for Writ of Certiorari, this is not a simple case involving the incorrect processing of an employment discrimination claim.

Four administrative claims were asserted by petitioner Clemente to respondent Air Force. The responsible officials of the Air Force refused to process three of the four administrative claims, but did process the discrimination claim. Petitioner Clemente asserts that a Bivens recovery is appropriate. Otherwise, federal agencies can affect, even terminate, civil service employees with impunity and can flaunt injunctive orders of a federal district court, all as has occurred in this case.

Through a reduction-in-force ("RIF"), respondent Air Force removed petitioner from her civil service position and permanently down-graded her civil service

grade. Four administrative claims were asserted . . .

1. RIF action was improper, not in good faith, for personal reasons, and was really a disciplinary measure.

2. RIF action was discriminatory.

3. There was a denial of RIF priority selection and RIF priority referral rights.

4. There was retaliation and reprisal because of the filing of the initial three claims.

Today, after over eight years, three of the four claims remain unresolved in spite of Air Force and Civil Service regulations requiring administrative processing. Mrs. Clemente has not had any administrative processing or hearings as were afforded to A. Ernest Fitzgerald in Fitzgerald v. Hampton 467 F.2d 755 (D.C.

Cir. 1972) (in banc) [1] nor damages as this Court directed in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

Thus, the issues posed in the Petition for Writ of Certiorari center around whether federal agencies can down-grade civil servants without affording regulatory administrative processing and whether federal agencies can deliberately flaunt the authority of a federal court without concern for the serious consequences of their actions.

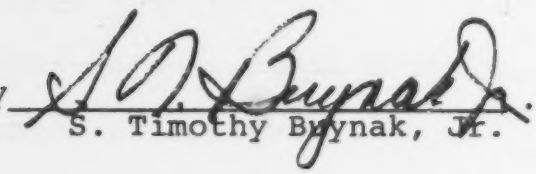
1/ The court of appeals' decision conflicts with Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). The Fitzgerald court found that the "statutory employment rights of Fitzgerald (were) within the liberty and property concepts of the Fifth Amendment," 467 F.2d at 762. See also Footnote 15, Nixon v. Fitzgerald, 457 U.S. 731 (1982). The underlying court of appeals' decision holds that petitioner Clemente has no property or liberty interests in her employment or career. Appendix A., pp. 23-24.

Based upon the significant issues presented herein and the conflict of the underlying court of appeals' decision with Fitzgerald v. Hampton, supra, and Owen v. City of Independence, Missouri, supra, the Petition for a Writ of Certiorari should be granted.

Dated: January 15, 1986

Respectfully submitted,

HATCH AND PARENT

By 
S. Timothy Bynak, Jr.

CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Lowene R. Clemente, petitioner herein, hereby certify that on January 15, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Reply Brief on each of the parties herein by placing a three copies thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addressed as follows:

Solicitor General
Department of Justice,
Washington, D.C. 20530

Edward R. Cohen
United States Department of Justice
Room 3127
9th and Pennsylvania, N.W.
Washington, D.C. 20530

All parties required to be served have been served.

Dated: January 15, 1986

S. Timothy Buyrak, Jr.

STB57